No. 08-1702

In The
Supreme Court of the United States

BRIAN EDWARD FRANKLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit improperly denied Petitioner's certificate of appealability to pursue relief based on actual innocence when a Texas district court held a post-conviction habeas hearing and found him actually innocent of the offense for which he is serving a life sentence, but the Texas Court of Criminal Appeals denied relief.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's unreported per curiam denial of Petitioner's Petition for Rehearing En Banc, with Judge Garza dissenting, is attached as Appendix A. The Fifth Circuit Court of Appeals panel's unreported opinion denying Petitioner a certificate of appealability (COA), with Judge Garza dissenting, is attached as Appendix B. Fifth Circuit Court of Appeals Judge Clement's unreported order denying Petitioner a COA is attached as Appendix C. The Northern District of Texas United States District Court's unreported order adopting the findings, conclusions, and recommendation of the United States Magistrate Court, is attached as Appendix D and found at *Franklin v. Dretke*, No. 4:03-CV-934-A, 2004 WL 1109542 (N.D. Tex. May 17, 2004). The Northern District of Texas United States Magistrate Court's unreported findings, conclusions, and recommendation are attached as Appendix E and found at *Franklin v. Dretke*, No. 4:03-CV-934-A, 2004 WL 877677 (N.D. Tex. Apr. 22, 2004). The Texas Court of Criminal Appeals' 2002 opinion is reported at 72 S.W.3d 671 (Tex. Crim. App. 2002) and attached as Appendix F. The State district court's unreported supplemental and revised conclusions of law and order are attached as Appendix G. The Texas Court of Criminal Appeals' 2001 unreported per curiam opinion is attached as Appendix H. The State district court's unreported original findings of fact, conclusions of law, and order are attached as Appendix I.

JURISDICTION

The Fifth Circuit Court of Appeals panel entered judgment on February 16, 2005, and denied Petitioner's

timely petition for rehearing en banc on March 16, 2005. App. A, B. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). He invoked the federal district court's jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution and 28 U.S.C. §§ 2244, 2253(c) and 2254, attached as Appendix J.

STATEMENT OF THE CASE

This case involves whether Petitioner can pursue relief based on actual innocence when a State district court held an exhaustive hearing on his post-conviction habeas writ and found him actually innocent under *Herrera v. Collins*, 506 U.S. 390 (1993), of the offense for which he is serving a life sentence, but the Court of Criminal Appeals denied relief.

A. State proceedings

1. Trial proceedings

A Tarrant County, Texas, grand jury indicted Petitioner for the aggravated sexual assault of 13 year-old Brandi Rachall (the complainant). App. I; Cl. R. at 3, 6.

Petitioner pled not guilty and proceeded to a jury trial. Ct. R. vol. VII, at 149.[1]

[1] "Cl. R" refers to the State trial clerk's record. "Ct. R." refers to the State trial reporter's record while "H. Ct. R." refers to the State habeas reporter's record, which is included in the Fifth Circuit Court of Appeals record. The Court of Criminal Appeals did not disagree with the State district court's findings of the historical facts, unlike some of its other

(Continued on following page)

The prosecution pointed out that the case against Petitioner rested largely on the complainant's testimony and credibility. App. I. For example, the prosecution in summation largely focused on the complainant's truthfulness and argued: "[W]hat it boils down to is: Do you believe Brandi Rachall? When you set everything aside, do you believe Brandi Rachall?" App. I; Ct. R. vol. XI, at 10-18, 35-46.

Despite the complainant's being at the top of her junior high school class, her claims before and during trial included numerous inconsistencies about the perpetrator's identity, the alleged offense date, and the details surrounding the alleged offense. App. I; Ct. R. vol. VIII, at 49, 134-37; Ct. R. vol. IX, at 8, 149; Ct. R. vol. X, at 56; Ct. R. vol. XIII, at Ex. 2, 7. The testimony of numerous witnesses and the corroborative evidence suggested that Petitioner could not have committed the alleged offense on or about the alleged offense date. App. I; Ct. R. vol. VIII, at 165, 200-01; Ct. R. vol. IX, at 149; Ct. R. vol. X, at 33-34, 88; Ct. R. vol. XIII, at Ex. 9.

Before Petitioner's trial, the complainant repeatedly told prosecutors and investigators that she had never had sexual relations before Petitioner allegedly sexually assaulted her. App. I. At trial, she testified that she was a virgin before the alleged offense:

Q. Had you ever had sex before?

A. No.

Id.; Ct. R. vol. IX, at 161. The complainant's testimony suggested she was sexually naïve, without any interest in dating. Ct. R. vol. IX, at 137.

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factual findings and its legal conclusions, so the State district court's findings of historical facts are cited as support. *See* App. F, G, I.

To support the complainant's claim that she was sexually assaulted, the prosecution relied on testimony regarding two pieces of physical evidence: a pair of the complainant's bloodstained panties and Dr. Lamb's diagnosis of hymen damage. App. I. No semen, hair, or any other physical evidence of Petitioner was discovered or collected. *Id.*; Ct. R. vol. VIII, at 53. There were no eyewitnesses (besides the complainant) to the alleged offense. App. I; Ct. R.

Petitioner did not testify in guilt-innocence or sentencing. *See* Ct. R.

The jury found Petitioner guilty and sentenced him to life imprisonment. App. I; Cl. R., at 224-25.

2. Post-trial and habeas proceedings

In May 1998, the Tarrant County District Attorney's Office notified Petitioner's trial counsel that the complainant had recently claimed that she and John Guerrero, her stepfather, had regularly engaged in sexual relations for 11 years. App. I. Sent with the notification was the complainant's May 5, 1998, affidavit to police, swearing that John Guerrero had:

(1) Touched her inappropriately since she was at least 6 years old,

(2) "[P]laced his fingers inside [her] vagina" since she was 7 years old, and

(3) Begun penetrating her vagina with his penis on a daily basis since she was 11 years old, and stopped penetrating her March 1, 1998.

Id. The 11-year period of John Guerrero's continuous sexual relations with the complainant included the time before, during, and after the sexual assault that Petitioner was accused of committing on her. *Id.*

Petitioner's present counsel investigated this newly discovered evidence and obtained the affidavit of Rose Anna Salinas, who was the lead prosecutor in the case. Salinas swore in her affidavit that the complainant's allegations against John Guerrero:

(1) "[D]irectly contradict[ed]" what she told prosecutors and investigators before trial and her testimony at trial,

(2) "[R]ender[ed] irrelevant" Dr. Lamb's testimony about the hymen damage,

(3) Showed the complainant testified falsely at trial, and

(4) Raised "such serious doubts about Franklin's guilt" that the prosecutor would have "immediately dismissed" the charges against him.

In June 1999, Petitioner filed a State application for post-conviction writ of habeas corpus under Texas Code of Criminal Procedure Article 11.07 and Article V, Section 5 of the Texas Constitution. The basis of his application was actual innocence under the due process clauses of the United States and Texas Constitutions. The prosecution conceded a hearing was necessary to address "controverted, unresolved facts."

The Tarrant County district court in which Petitioner was convicted held a four-day habeas corpus hearing.

Petitioner called several witnesses, including Salinas.[2]

Salinas testified that she was a Tarrant County Assistant District Attorney for almost 10 years, five of

[2] Petitioner called John Guerrero but he invoked his constitutional right against self-incrimination and therefore never testified. *See* H. Ct. R.

which were in the Crimes Against Children Unit. H. Ct. R. vol. III, at 11-12. She stated that she had taught law enforcement, prosecutors, and child protective services about child abuse. H. Ct. R. vol. III, at 13-15. She explained that Texas child advocacy centers honored her as a top prosecutor in child abuse cases. H. Ct. R. vol. III, at 16.

Salinas testified that it is important for the prosecution to know the sexual history of a child claiming sexual abuse. H. Ct. R. vol. III, at 18. She explained that the "theory of . . . the prosecution all the way through" trial was that Petitioner caused the complainant's hymen damage. H. Ct. R. vol. III, at 22. Salinas said the prosecution wanted to establish that the complainant "was very sexually naïve and had no other experiences other than this sexual abuse by Brian Franklin." H. Ct. R. vol. III, at 25.

Salinas testified that Dr. Lamb's and the complainant's testimony were the "two important factors in obtaining a conviction" of Petitioner. H. Ct. R. vol. III, at 34. Salinas said that Dr. Lamb's trial testimony was based on the "false presumption" of the complainant's virginity. H. Ct. R. vol. III, at 20. Salinas felt Dr. Lamb's testimony regarding the hymen damage was particularly important given a delayed outcry and no trace evidence, such as semen or hair. H. Ct. R. vol. III, at 28-30. Salinas said that she would not have been able to offer Dr. Lamb's testimony in light of the complainant's allegations against John Guerrero. H. Ct. R. vol. III, at 32-33. Salinas stated: "My opinion is that we used evidence to convict Brian Franklin that we would have not been entitled to use. And that would have been basically the medical evidence." H. Ct. R. vol. III, at 68.

Salinas testified that an "ongoing sexual relationship with John Guerrero certainly would have affected" evidence of blood in the complainant's panties. H. Ct. R. vol.

III, at 59. Salinas said the blood evidence would have been inadmissible. *Id.*

Salinas testified that she pursued Petitioner's prosecution because she believed the complainant, even though Petitioner passed a polygraph showing he did not penetrate or sexually assault the complainant. H. Ct. R. vol. III, at 31-32, 53-54. Salinas explained that the complainant "was not at a very tender age at the time we went to trial. She was not that little. She knew the importance of what we were doing in this courtroom. Absolutely knew it. She's a very smart, intelligent girl." H. Ct. R. vol. III, at 31-32. Salinas testified: "If I found out in the middle of trial that she had been lying to me, I might have moved to dismiss the case. That's how serious I would have taken the lie." H. Ct. R. vol. III, at 37. In response to the State district court's question, Salinas said: " . . . what I'm saying is I might have moved to dismiss this case. And I'm very serious about the fact that that's a very strong possibility that would have happened." H. Ct. R. vol. III, at 71. Salinas testified that "I just know that I no longer find her [the complainant] credible" and that Salinas would not now prosecute Petitioner for the alleged offense. H. Ct. R. vol. III, at 57.

Salinas repeatedly testified that the complainant's false testimony about her sexual history affected the jury's verdict:

> Q. So then in your opinion did this false information that permeated the case – and I say permeated because everybody she [the complainant] talked to and asked the question she said the same thing, no other sex. Did this false information in your opinion affect the integrity of the jury verdict?
>
> A. Yes.

H. Ct. R. vol. III, at 38.

Q. . . . it's your opinion, isn't it, that the integrity of the jury verdict is adversely affected by the lack of this information?

A. Yes.

H. Ct. R. vol. III, at 56.

A. . . . the concern I have is how it affected this verdict. That's my concern.

H. Ct. R. vol. III, at 74.

Q. But the bottom line is this jury verdict cannot be trusted because of the false information, isn't that true?

A. That's true.

H. Ct. R. vol. III, at 75.

Salinas concluded: " . . . I think anybody who knows me knows that I take it very seriously when I ask a jury to send someone to prison for life. I have to be sure about my case. And I always prosecuted cases that way. And to find out years later that this information has now come forward and that there is someone in prison who possibly is innocent is very, very serious to me. So it goes beyond just being displeased with her [the complainant]." H. Ct. R. vol. III, at 61-62. Salinas continued: "I thought I could evaluate that case properly to prosecute it and obviously I was wrong. She [the complainant] fooled me." H. Ct. R. vol. III, at 62.

The State district court issued several pages of original findings of fact, conclusions of law, and order, with extensive citations to the trial and habeas record, recommending relief based on Petitioner's actual innocence. *See* App. I.

3. The Court of Criminal Appeals

In Texas, the State district court makes a recommendation to the Court of Criminal Appeals of whether post-conviction habeas relief should be granted. *See* TEX. CODE CRIM. PROC. ch. 11. In Petitioner's case, the Court of Criminal Appeals remanded the case so that the state district court would apply *Herrera*, 506 U.S. at 390, as the Court of Criminal Appeals interpreted it. App. H.

The State district court submitted supplemental and revised conclusions of law and an order, boldfacing that Petitioner was innocent: **"After examining the new evidence and considering the fact of perjury to determine what the jury would do in light of the complainant's lowered credibility, this Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."** App. G. **"After examining the new evidence without considering the fact of the complainant's perjury to determine what the jury would have done if it had heard 'the truth' the first time around at trial, this Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."** *Id.* **"The Court concludes that, in light of the new evidence, Applicant Franklin is being unlawfully confined and is constitutionally entitled to a new trial under *Elizondo*."** *Id.*[3]

[3] In *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), the Court of Criminal Appeals applied *Herrera* and found a defendant, who filed an application for post-conviction writ of habeas corpus, actually innocent due to the complainant's recant in an aggravated sexual assault case. The Court of Criminal Appeals has arguably

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The Court of Criminal Appeals issued a published opinion in Petitioner's case. *See* App. F. Footnote 5 distilled the Court of Criminal Appeals' disagreement with the State district court: "We find in the present case that although the trial court properly applied the narrow holding of *Elizondo*, it failed to take into account its greater purpose." The Court of Criminal Appeals claimed that in a *Herrera*-type claim, where the applicant's conviction results from a constitutionally error-free trial, he must present "affirmative evidence" of his innocence. *Id.* at 677-678. The Court of Criminal Appeals cited no legal authority supporting this "affirmative evidence" holding. Citing *Schlup v. Delo*, 513 U.S. 298, 324 (1993), though, the Court of Criminal Appeals did set out examples of "affirmative evidence" in Footnote 7: "In addition to trustworthy witness recantations, other examples of such evidence may include exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence." *Id.* at 678. The Court of Criminal Appeals claimed that Petitioner "failed to present any new evidence aside from the fact that B.R. [the complainant] now alleges that she was also sexually assaulted by her stepfather. B.R. does not recant her trial testimony." *Id.*

The Court of Criminal Appeals opined that the new evidence in Petitioner's case was "limited to the impeachment of [the complainant's] claim that she did not have sexual relations with other men. It certainly calls into question her veracity in general, but only collaterally affects her accusation against applicant." *Id.* at 678. The Court of Criminal Appeals denied Petitioner relief because

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inconsistently applied *Herrera*. *See, e.g., Ex parte Stevens*, 963 S.W.2d 75 (Tex. Crim. App. 1997) (dissents from majority summarily denying relief in a virtually identical case to *Ex parte Elizondo*).

"[t]his evidence standing alone . . . is not dispositive of applicant's claim of innocence," since it did not affirmatively prove Petitioner's innocence. *Id.* at 678. The Court of Criminal Appeals failed to address federal cases, such as *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991) and *Richter v. Bartee*, 973 F. Supp. 1118 (D.Neb. 1997), that Petitioner repeatedly cited as support in his pleadings.

B. Federal proceedings

1. District court

After further investigating his case, including obtaining another polygraph Petitioner passed and an affidavit from a juror at Petitioner's trial who said he would acquit in light of the new evidence, Petitioner filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 in September 2003. Among other grounds, Petitioner explained that the Court of Criminal Appeals, in violation of 28 U.S.C. § 2254(d)(1): (1) examined "alone" the complainant's new claims against John Guerrero and therefore did not follow *Herrera*, and (2) held that the complainant's new allegations against stepfather John Guerrero only collaterally affected her credibility and did not affirmatively prove Petitioner's innocence. Petitioner also set out how the Court of Criminal Appeals, in violation of 28 U.S.C. § 2254(d)(2), did not properly defer to the State district court's actual innocence findings. Finally, he explained how actual innocence was an exception to the one-year statute of limitations for filing federal habeas petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.

Denying Petitioner's request for a hearing, the federal magistrate court issued findings, conclusions, and a

recommendation denying Petitioner relief.[4] App. E. Specifically, the federal magistrate court found that Petitioner had not shown his actual innocence under *Herrera* and that the one-year limitations required that his habeas petition be dismissed with prejudice. *Id.* The federal magistrate court held that Petitioner's actual innocence did not justify equitable tolling because no Fifth Circuit Court of Appeals opinion has "expressly" allowed this. *Id.*

Petitioner timely objected to the federal magistrate court's findings, conclusions, and recommendation.

Without a hearing, the federal district court overruled Petitioner's objections, found that he failed to prove his actual innocence as the Court of Criminal Appeals noted, and adopted the federal magistrate court's findings, conclusions, and recommendation. App. D.

Petitioner sought a COA in federal district court, explaining how "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" regarding his actual innocence and the one-year limitations. The federal district court denied a COA.

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[4] While the *Herrera* majority opinion could be read as barring a bare innocence claim in federal courts because it does not involve a constitutional violation, the *Herrera* concurrence suggests and the Texas Court of Criminal Appeals has held that such a claim implicates the due process clause of the United States Constitution. *See Elizondo*, 947 S.W.2d at 204. Federal courts in Petitioner's case addressed his actual innocence because it was raised in the context of 28 U.S.C. § 2254(d).

2. The Fifth Circuit Court of Appeals

Petitioner sought a COA in the Fifth Circuit Court of Appeals. Judge Clement denied the COA. *See* App. C.

Petitioner then filed a motion for panel rehearing and a divided panel issued an opinion. Judges Clement and DeMoss issued a majority opinion denying Petitioner a COA. App. B. The panel majority reiterated that a "claim" of actual innocence does not toll the one-year limitations under AEDPA. *Id.* The panel majority continued: "Although this Court has not decided whether a *showing* of actual innocence will toll the limitations period, *see, e.g.*, *Molo v. Johnson*, 207 F.3d 773, 775 (2000), the instant case is not an appropriate vehicle for such a determination. . . . Franklin's newly discovered evidence, which tends to undermine the credibility of a key witness from his trial, does not rise to the level of a showing of actual of (*sic*) innocence." *Id.* (emphasis in original).

Judge Garza's dissent pointed out that the State district court signed "extensive" orders setting out Petitioner's innocence: "The trial court's opinion . . . included an extensive analysis and explanation of its findings and how the new evidence not only affected the alleged victim's credibility, but also most of the other evidence presented at trial. The trial court also included the testimony of the lead prosecutor demonstrating her concern with Petitioner's conviction in light of the new evidence." *Id.* Unlike the majority, Judge Garza referred to and incorporated the COA standard in his opinion. *Id.* Judge Garza explained why Petitioner should receive a COA: "This court has not determined whether a showing of factual innocence could toll the limitations period" and "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Judge Garza's

opinion concluded citing *Lonchair v. Thomas*, 517 U.S. 314, 324 (1996): "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.*

Petitioner filed a motion for rehearing en banc, which was denied with Judge Garza again dissenting. App. A.

REASONS FOR GRANTING THE PETITION

This Court should grant Petitioner's petition for certiorari because:

1. The Fifth Circuit has entered a decision in conflict with the decision of other United States courts of appeals on the same important matters of the *Schlup* and *Herrera* actual innocence standards and of whether actual innocence is an exception to the one-year limitations under AEDPA.

2. The Court of Criminal Appeals has decided the important federal question of applying the *Schlup* and *Herrera* actual innocence standards in a way that conflicts with the decision of United States courts of appeals.

3. The Fifth Circuit and the Court of Criminal Appeals have decided the important federal question of whether Petitioner has shown his actual innocence under *Schlup* and *Herrera* in a way that conflicts with relevant decisions of this Court.

4. The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, in denying Petitioner's COA when a State district court found him

actually innocent, as to call for an exercise of this Court's supervisory power.

5. The Fifth Circuit has decided the important question of federal law of whether actual innocence is an exception to the one-year limitations under AEDPA that has not been, but should be, settled by this Court.

See SUP. CT. R. 10.

A. The Fifth Circuit and Court of Criminal Appeals have decided important federal questions and entered decisions of whether Petitioner has shown his actual innocence under *Schlup* and *Herrera* in a way that conflicts with this Court and other United States courts of appeals

1. Introduction

This Court has repeatedly pointed out that "the central purpose" of criminal justice "is to convict the guilty and free the innocent." *Herrera*, 506 U.S. at 859. "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Schlup*, 513 U.S. at 325 (citations omitted). In this context, no legal distinction exists between sentencing a prisoner to death or a term of imprisonment: "It would be a rather strange jurisprudence . . . that under our Constitution [the actually innocent] could not be executed, but that he could spend the rest of his life in prison." *Herrera*, 506 U.S. at 405.

The "principal" purpose of habeas corpus is "to serve as a bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). The

"Great Writ" of habeas corpus is "the most celebrated writ in the English law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity . . . " *Fay v. Noia*, 372 U.S. 391, 400 (1962), overruled on other grounds, *Coleman v. Thompson*, 501 U.S. 722 (1991). "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired and unsuspended, save only in the cases specified in our Constitution.'" *Id.* (citations omitted). Habeas corpus is based on the principle that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." *Id.* at 402.

Actual innocence claims in habeas petitions are categorized as either a *Herrera* or a *Schlup* claim. A *Herrera* claim involves a substantive claim in which the petitioner asserts a bare claim of innocence. *Schlup*, 513 U.S. at 314. A *Schlup* claim, on the other hand, is a procedural claim in which the petitioner's claim of innocence does not alone provide a basis for relief but is a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits. *Id.*

Society has an interest in finality, comity, and conservation of scarce judicial resources, as reflected in AEDPA. *Id.* at 317-19. But this interest must give way to a petitioner who is actually innocent. *Id.* at 320-21. "Explicitly tying the miscarriage of justice exception to innocence

thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'" *Id.* at 322 (citations omitted).

2. Conflict with this Court and other United States courts of appeals

Relying on *Schlup v. Dèlo*, 513 U.S. 298, 324 (1993), the Court of Criminal Appeals claimed that Petitioner "failed to present any new evidence" besides the complainant's allegation against her stepfather, which "certainly calls into question her veracity in general, but only collaterally affects her accusation against applicant." App. F at 678. The Court of Criminal Appeals denied Petitioner relief because "[t]his evidence standing alone . . . is not dispositive of applicant's claim of innocence," since it did not affirmatively prove Petitioner's innocence. *Id.* The Court of Criminal Appeals cited no legal authority supporting this "affirmative evidence" holding. The Fifth Circuit affirmed the Court of Criminal Appeals' reasoning. App. B.

"Affirmative evidence" and "new evidence" of innocence are dealt with in turn.

a. "Affirmative evidence of applicant's innocence"

Nothing in *Herrera* or *Schlup* requires "affirmative evidence of applicant's innocence." *Schlup* included "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," as examples of "new reliable evidence," but also held "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments."

Schlup, 513 U.S. 298, 324-25, 330. Further, this Court has observed that the "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . " *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Federal appeals courts have held that *Schlup* extends to witness credibility. For example, in *Souter v. Jones*, 395 F.3d 577, 580 (6th Cir. 2005), Souter was charged with murder. The deceased was found with lacerations on her forehead, which led a police detective to believe someone murdered her with a sharp-edged instrument. *Id.* at 581-82. The medical examiner and other forensic pathologists agreed with the police detective. *Id.* at 582. The prosecutor's experts said the deceased's injuries were consistent with a sharp-edged instrument, like a glass bottle, but a defense expert said a passing vehicle, not a sharp-edged instrument, caused the fatal injuries. *Id.* at 583. Nevertheless, the jury convicted Souter of second-degree murder. *Id.* at 577.

Three years after his conviction, Souter filed a motion for new trial based on new evidence of actual innocence. *Id.* The State courts found he failed to meet his burden and affirmed his conviction. *Id.*

A year after losing his direct State appeal, Souter filed a habeas corpus petition under 28 U.S.C. § 2254 based on new evidence of actual innocence, which included:

(1) An affidavit from a prosecution expert at trial concluding (inconsistently from his testimony) that "it is unlikely" a bottle caused the deceased's injuries,

(2) Affidavits from police and private investigators stating the bottle recovered did not have a sharp edge, and

(3) Photos of blood on the deceased's clothing that were not presented at trial and that suggested a car struck the deceased.

Id. at 583-84.

The federal magistrate court found that Souter's new evidence "chips away at the rather slim circumstantial evidence upon which the petitioner was convicted" and "is sufficient for the limited purpose of equitably tolling the statute of limitations and permitting the court to reach the merits of the claim." *Id.* at 584. The federal district court denied relief because Souter failed to establish his actual innocence since "none of [his new] evidence conclusively establishes that the bottle could not have inflicted the wounds on the victim." *Id.* The Court of Criminal Appeals and federal courts used similar language to deny Petitioner relief.

In a well-reasoned, lengthy opinion, a Sixth Circuit panel unanimously held: "A correct reading of *Schlup* reveals that examples following the words 'new reliable evidence' were not meant to be an exhaustive list of everything upon which an actual innocence claim may be based. The Court in *Schlup* specifically stated that 'the newly presented evidence may call into question the credibility of the witnesses presented at trial.'" *Id.* at 593. The Sixth Circuit found that Souter showed his actual innocence, which tolled the one-year limitations under AEDPA. *Id.* at 596-601.

In *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002), a Ninth Circuit panel unanimously held: "In seeking to prove actual innocence, to avoid a procedural default, a petitioner for a writ of habeas corpus need not always affirmatively show physical evidence that he or she did not commit the crime with which he or she is charged. *Rather, a petitioner may pass through the Schlup gateway*

by promulgating evidence that significantly undermines or impeaches the credibility of witnesses presented at trial. . . . " (emphasis added).

Lewis, 946 F.2d at 1361, which Petitioner cited below but the Court of Criminal Appeals and federal courts failed to address, is an Eighth Circuit pre-*Herrera* case that has been approvingly cited in post-*Herrera* and *Schlup* cases. *See, e.g., United States v. Dogskin*, 265 F.3d 682 (8th Cir. 2001). In *Lewis*, both Lewis and Carter were charged with raping the complainant. *Lewis*, 946 F.2d at 1361-62. Lewis was convicted of rape and Carter proceeded to trial. *Id.* at 1362. The complainant recanted her identification of Carter early in his trial. *Id.* at 1362. Lewis appealed and the Minnesota Court of Appeals concluded, like the Court of Criminal Appeals and federal courts in Petitioner's case, that the recanted testimony would not produce a different result on retrial because the recantation could only be used to impeach the complainant rather than to show Lewis' innocence. *Id.*

Lewis lost his direct State appeal and filed a habeas corpus petition under 28 U.S.C. § 2254 based on new evidence of actual innocence. *Id.* at 1361. Relying on the Minnesota Court of Appeals decision, the federal magistrate court issued a report recommending denial of Lewis' petition. *Id.* at 1362. The federal district court adopted the magistrate judge's recommendation and denied Lewis' petition. *Id.* The Eighth Circuit unanimously held: "Recanted testimony, however, is grounds for relief from a conviction when it either bears on a witness's credibility or directly on the defendant's guilt." *Id.* (citing *Williams v. Griswald*, 743 F.2d 1533, 1541 (11th Cir. 1984) and *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). "We think a comparison of the victim's earlier testimony that there was 'no doubt in her mind' Lewis and Carter attacked her with her later recantation would destroy her credibility in the jury's

eyes," the Eighth Circuit explained in reversing the lower courts and granting a new trial. *Id.* "Considering the link between the two men established by both the victim and Lewis himself, we think the victim's recantation of Carter's identification casts serious doubt on the credibility of her identification of Lewis. Given the victim's recantation, we do not believe a second jury would convict Lewis." *Id.* at 1362-63.

While not a federal appeals court case, *Richter v. Bartee*, 973 F. Supp. 1118 (D. Neb. 1997), is factually similar to Petitioner's case and indicates how a federal district court reached an opposite conclusion. Petitioner cited *Richter* below but the Court of Criminal Appeals and federal courts failed to address it. Richter was charged with sexual assault. *Id.* No eyewitness saw the alleged offense and no 'trace evidence,' such as fibers or DNA, was recovered. *Id.* at 1120. The complainant claimed that she did not have sexual relations with anyone for at least six weeks before the alleged offense. *Id.* She identified Richter as the person who raped her. *Id.* at 1121. Richter called an alibi witness at trial to establish that Richter could not have raped the complainant. *Id.* "Simply put, the only evidence that Richter committed this rape, or that the victim was ever raped by anyone, derives from the victim." *Id.* at 1125. Nevertheless, a jury convicted Richter of sexual assault. *Id.*

Richter lost his direct State appeal and filed a habeas corpus petition under 28 U.S.C. § 2254 based on new evidence of actual innocence. *Id.* at 1121-22. The new evidence included forensic testimony about the complainant's wounds being self-inflicted, psychiatric testimony about her having a severe personality disorder, and evidence that the complainant lied about her sexual history. *Id.* at 1122-23. The federal district court granted Richter relief because "if this case were retried at this

time, [the complainant] would have to testify as the prosecuting witness. . . . Apart from [her], there is virtually no evidence, physical or otherwise, that Richter raped her. Upon retrial her credibility would most assuredly be attacked." *Id.* at 1130. The court declared: "Without her testimony as a credible witness, it is inconceivable that petitioner would be convicted." *Id.* The court concluded: "My review of the evidence adduced at the hearing before me leads me to conclude that petitioner has more than met the test set out by the Supreme Court in *Schlup*. Indeed, in my opinion *it is an understatement to say that 'it is more likely than not 'no reasonable juror' would have convicted him.'*" *Id.* (emphasis added).

b. "New evidence"

The Court of Criminal Appeals held that an "applicant asserting a *Herrera*-type claim must show *by clear and convincing evidence* that no reasonable juror would have convicted him in light of the newly discovered evidence," and that Petitioner "failed to present any new evidence" besides the complainant's allegations against John Guerrero. App. F at 677-78 (emphasis in original). The Court of Criminal Appeals failed to factor into the innocence equation the evidence that, while not newly discovered, was newly presented and that the State district court found supported Franklin's innocence, such as:

(1) Witness testimony and corroborative evidence, namely Petitioner's sales receipts and telephone bill records, proving that he was never with the complainant on or about the alleged offense date.

(2) Salinas' testimony that the relevance of the bloodstained underwear and hymen damage depended on the complainant's repeated lies

about her sexual history before and during trial.

(3) Evidence that the complainant's nightmares, migraines, counseling, and change in dress did not result from Petitioner's alleged sexual assault.

See App. F-I.

The *Schlup* majority discusses *Herrera* at length, including the differences between a *Schlup* and *Herrera* claim, but never states that actual innocence claims have to be based on newly discovered – as opposed to new reliable – evidence. *Schlup*, 515 U.S. at 315-16. In fact, the *Schlup* majority only refers to "new reliable" and "newly presented" evidence. *Id.* at 324, 330, 332. The *Schlup* majority explained: "In assessing the adequacy of petitioner's showing [of actual innocence], the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327. Indeed, this Court remanded Schlup's case because of compelling exculpatory statements from witnesses who were available at trial but who the defense failed to interview or call.[5] *Id.* Citing *Schlup*, this Court held: "'To be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998).

[5] On remand the district court held an evidentiary hearing and found that *Schlup* had made a sufficient showing of actual innocence to entitle him to a hearing on his barred claims. *Schlup v. Delo*, 912 F.Supp. 448, 455 (E.D.Mo. 1995). Chief Judge Hamilton subsequently concluded in an unpublished order that Schlup had been denied effective assistance of counsel at trial and that his writ should be granted. *Amrine v. Bowersox*, 128 F.3d 1222, 1228 (8th Cir. 1997).

This is logical because a *Herrera* claim requires a higher burden of proof than a *Schlup* claim. Limiting a petitioner with a *Herrera* claim to only newly discovered evidence would make it unreasonably onerous on him.

In *Souter*, the Sixth Circuit held that newly presented evidence does not mean newly discovered. *Souter*, 395 F.3d at 595, n. 9. Thus, in determining the petitioner's innocence, the Sixth Circuit considered the photographs of the deceased's bloody shirt, because they were never presented to the jury even though available. *Id.*

In the recent decision, *United States v. Davies*, 394 F.3d 182, 191 n. 8 (3rd Cir. 2005), a unanimous Third Circuit panel pointed out that "'new evidence' in the innocence context does not necessarily mean 'newly discovered' evidence." The Third Circuit panel cited two other federal appeals courts for the conclusion that "*Schlup* allows a petitioner to offer 'newly presented' evidence (that is, evidence that was not presented to the trier of fact)" and that "a petitioner is not limited to offering only 'newly discovered' evidence (that is, evidence discovered post-conviction)" (citing *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003) and *Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003)). *Id.* But the Third Circuit held that procedural reasons prevented it from deciding the 'newly presented' versus 'newly discovered' issue. *Id.*

In *Gomez*, the "Respondent argue[d] that this evidence cannot be considered new because it [was] not newly discovered, *i.e.*, Gomez was aware of its existence at the time of trial." *Id.* at 679. But the Seventh Circuit held "nothing in *Schlup* indicates that there is such a strict limitation on the sort of evidence that may be considered in the probability determination. All *Schlup* requires is that the new evidence is reliable and that it was not

presented at trial." *Gomez*, 350 F.3d at 679 (citing *Schlup*, 513 U.S. at 324 and *Calderon*, 523 U.S. at 559).

Gomez, though, cites *Herrera* for the proposition that "a petitioner claiming that his factual innocence alone entitles him to habeas corpus relief must present newly discovered evidence," which seemingly contradicts the language in *Calderon* stating that actual innocence claims (without distinguishing between a *Schlup* and *Herrera* claim) "must be based on reliable evidence not presented at trial." *Calderon*, 523 U.S. at 559.

Following a detailed discussion of *Schlup*, including Justice O'Connor's concurrence, a unanimous Ninth Circuit panel in *Griffin* held that *Schlup* requires newly presented, not newly discovered, evidence of innocence. *Griffin*, 350 F.3d at 961-62.

However, an Eighth Circuit panel has unanimously held just the opposite: "The sort of evidence that cannot be used for a *Schlup* gateway claim includes 'evidence [that] could have been discovered earlier in the exercise of due diligence.'" *Nance v. Morris*, 392 F.3d 284, 291 (8th Cir. 2004) (quoting *Cornell v. Nix*, 976 F.2d 376, 380 (8th Cir. 1992) (en banc); *accord Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996)).

B. The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, in denying Petitioner's COA when a State district court found him actually innocent, as to call for an exercise of this Court's supervisory power.

A COA must issue if a petitioner makes a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A "substantial showing" includes issues that

are debatable among jurists of reason, that another court could resolve differently, that are suitable enough to deserve encouragement to proceed further, that are not squarely foreclosed by an authoritative court decision, or that are not lacking any factual basis in the record. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983) (citations omitted).

This Court has held that when a federal district court rejects a prisoner's constitutional claims on the merits, a COA must issue if he demonstrates that reasonable jurists would find the federal district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the federal district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a COA must issue if the petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and debatable whether the federal district court was correct in its procedural ruling. *Id.*

In defining "substantial showing," this Court has admonished courts that they may not deny COA simply because the habeas petition has been denied on the merits: "Obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot*, 463 U.S. at 893 n. 4 (citations omitted). Thus, this Court has warned: "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.*

In denying Petitioner relief, the Fifth Circuit panel majority misconstrued the standard for the COA. The panel majority focused not on whether "reasonable jurists" could debate but on its own conclusion that Petitioner's

claim lacked merit. *See* App. B. Unlike Judge Garza's dissent, the panel majority never referred to the standard for a COA. *Id.* The panel majority merely held that Petitioner failed to adequately prove his innocence. *Id.* The panel majority therefore held that Petitioner's case was not "an appropriate vehicle" to determine whether an actual innocence showing – as opposed to a mere claim – would toll the one-year limitations under AEDPA. *Id.*

The Fifth Circuit panel majority also disregarded 28 U.S.C. § 2254(e)(1), which states in part that "a determination of a factual issue made by a State court shall be presumed correct," unless clear and convincing evidence rebuts this presumption. Federal courts must presume correct the State district court's – not the Court of Criminal Appeals' – explicit and implicit factual findings and credibility determination when the trial court held a full and fair live evidentiary hearing. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Craker v. Procunier*, 756 F.2d 1212 (5th Cir. 1985). Federal courts cannot reject the State district court unless they "conclude that the state [district] court's findings lacked even 'fair support' in the record." *See, e.g., Marshall v. Longberger*, 459 U.S. 422, 432-34 (1983).

In Petitioner's case, the State district court held a habeas corpus hearing that spanned several days and included many exhibits and witnesses, including Petitioner, Salinas, and the complainant and her family. *See* App. G and I. Based on all of this evidence, along with the witnesses' demeanor, the State district court made extensive written factual findings and legal conclusions, replete with record citations, finding Petitioner actually innocent. *Id.* The State district court implicitly and explicitly found that the evidence proved Petitioner was not present with the complainant at the time of the alleged offense. *Id.* The State district court found that the complainant's perjury,

given the tenuous trial evidence, struck at the heart of the prosecution's case and proved Petitioner's innocence. *Id.* The State district court hardly considered this crucial evidence of perjury as just "a collateral matter," as the Court of Criminal Appeals and federal courts did. *Id.* In granting relief based on Petitioner's actual innocence, the State district court suggested that all of the complainant's trial testimony was false and that she had no credibility. *Id.*

In the Fifth Circuit, Judge Garza's dissent pointed out that the State district court signed "extensive" orders setting out Petitioner's innocence. *See* App. B. Judge Garza correctly held that Petitioner should receive a COA. *Id.* Indeed, the fact that a Fifth Circuit judge dissented indicates "reasonable jurists" could debate whether Petitioner's actual innocence tolled the one-year limitations under AEDPA.

C. The Fifth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter of whether actual innocence is an exception to the one-year limitations under AEDPA, and has decided an important question of federal law that has not been, but should be, settled by this Court.

The Fifth Circuit panel majority refused to rule on whether an actual innocence showing – as opposed to a mere claim – would toll the one-year limitations under AEDPA. Petitioner has already explained how the Court of Criminal Appeals and federal courts erred in disregarding the State district court's findings and in holding that he did not prove his innocence. Judge Garza's dissent correctly held that "reasonable jurists" could debate whether

Petitioner's actual innocence tolled the one-year limitations under AEDPA.

The Fifth Circuit panel majority's holding on the one-year limitations conflicts with other appeals courts. The Second, Third, Seventh, Eighth, Ninth, and District of Columbia Circuits have not held whether actual innocence tolls the limitations. The Fourth Circuit in *Rouse v. Lee*, 339 F.3d 238, 251 (4th Cir. 2003) has held that actual innocence does not toll the limitations. But the First Circuit in *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003), the Sixth Circuit in *Souter*, 395 F.3d at 577, the Tenth Circuit in *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003), and the Eleventh Circuit in *United States v. Montano*, 398 F.3d 1276, 1285 (11th Cir. 2005), have held that actual innocence does toll the limitations.

Absent an actual innocence exception, AEDPA would give rise to serious questions regarding the Suspension Clause under Article I, Section 9, the Due Process Clause under the Fifth and Fourteenth Amendments, and the Cruel and Unusual Punishment Clause under the Eighth and Fourteenth Amendments of the United States Constitution.

This Court has repeatedly held that a claim that is procedurally defaulted at the State level can still be reviewed federally if failure to address its merits would lead to a "miscarriage of justice." *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Courts have not clearly defined "miscarriage of justice," but it at least extends to "actual innocence." *See, e.g., Schlup*, 513 U.S. at 324-26; *Herrera*, 506 U.S. at 390. A petitioner's demonstration of factual innocence can bypass procedural default due to failure to exhaust State remedies. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Schlup*, 513 U.S. at 324-26. It would make little sense for there to be an actual innocence exception to a State procedural

default bar but not to the one-year limitations bar under AEDPA.

CONCLUSION

The petition for writ of certiorari therefore should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10641

BRIAN EDWARD FRANKLIN

Petitioner-Appellant

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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(Filed Feb. 16, 2005)

Before GARZA, DEMOSS, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Brian Edward Franklin was convicted of aggravated sexual assault of a child under age 14 years and was sentenced to life imprisonment. Franklin now seeks a certificate of appealability ("COA") to pursue his claim of actual innocence. His claim previously was denied by a member of this panel and Franklin sought reconsideration. A majority of the panel now affirms that denial.

Franklin identifies four issues for appeal: (1) whether the district court erred in affirming the Texas Court of

Criminal Appeals that his new evidence did not constitute actual innocence; (2) whether the district court erred in failing to rebut the state trial court's finding of actual innocence; (3) whether Franklin's claim of actual innocence tolled the federal limitations period; and (4) whether the district court erred in finding that the federal limitations period began to run in May, 1998 rather than March, 2003.

This Court need only address the issues of procedural default. A one-year limitations period applies to the filing of habeas petitions by state prisoners. 28 U.S.C. 2244(d)(1)(A)-(D) (stating the one-year limitations period will begin on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"). Franklin maintains that the factual predicate to his claim of actual innocence occurred in March, 2003, when Franklin obtained an affidavit from a juror at his trial. In the affidavit, the juror averred that he would have voted to acquit Franklin had he known that a key witness had perjured herself. In fact, the factual predicate to Franklin's claim of actual innocence occurred when Franklin became aware of the witness's false testimony in May, 1998. The limitations period does not provide for extra time for an applicant to gather evidence to support his claim. *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). Franklin's habeas petition was filed September 9, 2003 and therefore is time barred.

A claim of actual innocence does not toll the federal limitations period for habeas petitions. *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). Although this Court has not decided whether *a showing* of actual innocence will toll the limitations period, *see, e.g., Molo v. Johnson*, 207 F.3d

773, 775 (2000), the instant case is not an appropriate vehicle for such a determination. For a trial free of constitutional error, a habeas petitioner must do more than raise doubt as to whether the jury would re-convict him given newly discovered evidence. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 315-16 (1995) (citing *Herrera v. Collins*, 506 U.S. 390, 419 (1993)). Rather, petitioner's newly discovered evidence must affirmatively show his innocence, such as the recantation of a key witness or exculpatory evidence. *Schlup*, 513 U.S. at 324. Franklin's newly discovered evidence, which tends to undermine the credibility of a key witness from his trial, does not rise to the level of a showing of actual of innocence.

IT IS ORDERED that the motion is DENIED.

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that petitioner, Brian Edward Franklin, filed an untimely petition. I do not agree, however, with the majority's denial of COA on Franklin's claim that actual innocence entitled him to equitable tolling of the limitations period.

The general rule is that a declaration of actual innocence does not constitute a "rare and exceptional" circumstance, as required by *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998), that entitles a petitioner to invoke equitable tolling to avoid a procedural limitations bar. *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). However, in *Felder*, we noted that the petitioner had "not made a *showing* of actual innocence." *Id.* at 171 n. 8 (emphasis in original). In *Molo v. Johnson*, 207 F.3d 773, 775 (5th cir.

2000) this court did not answer the question of whether proof of factual innocence would toll the limitations period because it held that the petitioner had failed to demonstrate actual innocence. Relying on this footnote in *Felder*, the district court in *Alexander v. Johnson* held that equitable tolling is permitted if a petitioner *demonstrates* actual innocence. 217 F.Supp.2d 780, 791-92 (S.D. Tex. 2001) ("In the context of a claimed procedural default, a petitioner is excused from complying with state procedural requirements if he 'can make a persuasive showing that he is actually innocent of the charges against him,' because to hold otherwise would effect 'fundamental miscarriage of justice.'") (quoting *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001)).

The district court rejected Franklin's attempt to distinguish between an "unsupported claim of actual innocence" and a "colorable claim of innocence." Franklin has not simply declared his innocence. The trial court, after an extensive hearing, concluded that Franklin should receive a new trial. The court concluded that Franklin had "shown through clear and convincing evidence, that [the victim's] lies and perjury regarding her sexual history, superimposed over the weak inculpatory evidence at his trial, create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial." The trial court in its extensive order stated that the new evidence created doubt as to the efficacy of the jury's verdict. The Texas Court of Criminal Appeals, however, remanded because the trial court had misstated the standard of review. In a supplemental opinion, the trial court again concluded that "Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."

The trial court's opinion again included an extensive analysis and explanation of its findings and how the new evidence not only affected the alleged victim's credibility, but also most of the other evidence presented at trial. The trial court also included the testimony of the lead prosecutor demonstrating her concern with Franklin's conviction in light of the new evidence.

The district court correctly stated that no Fifth Circuit case law expressly requires that a distinction be made between an unsupported claim of actual innocence and a colorable claim of innocence. *Franklin v. Dretke*, No. CIV.A.4:03-CV-934-A, 2004 WL 877677, at *3 n. 3 (N.D. Tex. April 22, 2004). This court has not determined whether a showing of factual innocence could toll the limitations period. I believe that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). Therefore, I respectfully dissent and would grant Franklin a COA.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10641
USDC No. 4:03-CV-934-A

BRIAN EDWARD FRANKLIN,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Oct. 20, 2004)

ORDER:

Brian Edward Franklin, Texas prisoner # 703704, seeks a certificate of appealability ("COA") to appeal the dismissal of his 28 U.S.C. § 2254 application in which he attacked his 1995 conviction for sexual assault of a child under age 14 years of age. The district court concluded that Franklin's application was untimely.

A COA may be issued only if Franklin has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court's dismissal

is on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Franklin argues that the limitations period did not begin to run until March 2003, when he obtained an affidavit from a trial juror, and that his claim of actual innocence entitled him to equitable tolling of the limitations period. Franklin has not shown that reasonable jurists would find the district court's resolution of his claims debatable or wrong. *See Slack*, 529 U.S. at 484. His request for a COA is DENIED.

/s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION.

BRIAN EDWARD FRANKLIN, Petitioner	§	
VS.	§	
DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	NO. 4:03-CV-934-A
Respondent.	§	

ORDER

(Filed May 17, 2004)

Came on for consideration the above-captioned action wherein Brian Edward Franklin is petitioner and Douglas Dretke, Texas Department of Criminal Justice, Correctional Institutions Division, is respondent. This is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. On April 22, 2004, the United States Magistrate Judge issued his proposed findings, conclusions, and recommendation ("FC&R"), and ordered that the parties file objections, if any, thereto by May 13, 2004. On May 7, 2004, respondent filed his objections. And, on May 13, 2004, petitioner filed his objections. In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the court makes a *de novo* determination of those portions of the proposed findings or recommendations to which specific objection is made. *United States v. Raddatz*, 447 U.S. 667 (1980). The court is not addressing any nonspecific objections or any frivolous

or conclusory objections. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

Respondent objects to the magistrate judge's recitation that limitations began to run on May 15, 1999, and expired one year later on May 15, 2000. FC&R at 5. As respondent points out, the record reflects that limitations began to run on May 15, 1998, when petitioner's counsel received notice from the State that a key witness had perjured herself at trial. The one-year period expired on May 15, 1999. 28 U.S.C. § 2244(d)(1)(D).

Petitioner objects to the magistrate judge's finding that his habeas petition was untimely. He urges that limitations did not begin to run until March 2003, when he obtained a juror's affidavit to support his claims. Limitations runs, however, from the time when the petitioner knows the factual predicate of his claims. *See Flanagan v. Johnson*, 154 F.3d 196, 198-99 (5th Cir. 1998). Here, the factual predicate was known in May 1998. The time spent gathering evidence does not change the character of petitioner's claim of actual innocence or provide any new ground for his federal habeas petition. *Id.* Petitioner's attempt to distinguish *Flanagan* is without merit. Finally, petitioner urges that limitations must be tolled because he is actually innocent. As noted by the Court of Criminal Appeals of Texas, however, the "newly discovered evidence" does not establish petitioner's actual innocence, but only impeaches the trial testimony of the victim. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002). Although petitioner's victim had also been sexually assaulted by her stepfather, she testified at the habeas hearing, consistent with her trial testimony, that she had been sexually assaulted by petitioner. *Id.*

As noted herein, the court accepts the findings, conclusions and recommendation of the magistrate judge and ORDERS that the petition in this action be, and is hereby, dismissed as untimely.

SIGNED May 17, 2004.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION.

BRIAN EDWARD FRANKLIN,	§	
Petitioner	§	
	§	
VS.	§	
	§	
DOUGLAS DRETKE,	§	
DIRECTOR, TEXAS	§	NO. 4:03-CV-934-A
DEPARTMENT OF CRIMINAL	§	
JUSTICE, CORRECTIONAL	§	
INSTITUTIONS DIVISION,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

(Filed May 17, 2004)

In accordance with the court's order of even date herewith,

The court ORDERS, ADJUDGES, and DECREES that the petition of Brian Edward Franklin for writ of habeas corpus pursuant to 28 U.S.C. § 2254 be, and is hereby, dismissed as untimely.

SIGNED May 17, 2004.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRIAN EDWARD FRANKLIN,	§	
	§	
Petitioner,	§	**Civil Action No.**
	§	**4:03-CV-934-A**
v.	§	
	§	
DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	
	§	
	§	
	§	
	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

(Filed Apr. 22, 2004)

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge are as follows:

I. FINDINGS AND CONCLUSIONS

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus by a state prisoner under 28 U.S.C. § 2254.

B. Parties

Petitioner Brian Edward Franklin, Prisoner No. 703704, is in custody of the Texas Department of Criminal Justice, Correctional Institutions Division, and is presently incarcerated in Rosharon, Texas.

Respondent Douglas Dretke is the Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

C. Factual and Procedure History

Franklin was charged in the underlying state criminal case with aggravated sexual assault of B.R., a child younger than fourteen years of age. (Pet'r Second Amended Petition at Appendix 1.) On February 24, 1995, a jury found Franklin guilty of the charged offense, and, on February 25, 1995, it assessed his punishment at life imprisonment. (*Id.*) The Second District Court of Appeals of Texas affirmed the trial court's judgment of conviction on October 17, 1996. *Franklin v. Texas,* No. 2-95-084-CR (Tex. App. – Fort Worth Oct. 17, 1996) (not designated for publication). In turn, the Texas Court of Criminal Appeals refused his petition for discretionary review on February 26, 1997. *Franklin v. Texas,* PDR No. 157-97. Franklin did not seek writ of certiorari. (Original Petition at 3.)

On May 15, 1998, the state prosecutor sent a letter to Franklin's trial counsel, in which she enclosed "various affidavits, police investigation notes, and other information" that she indicated "may or may not concern" Franklin's case. (Pet'r Second Amended Petition at 9; State Habeas R. at 32.) Among the documents was an affidavit by B.R. in which she stated that she had been sexually assaulted by her step-father on numerous occasions before,

during, and after the assault by Franklin. (State Habeas R. at 34-35.) This statement conflicted with B.R.'s testimony at trial that she had never had sex before the assault by Franklin. (*Id.* at 18.)

On June 8, 1999, Franklin filed a state application for writ of habeas corpus based on the newly discovered evidence, which he argued was proof of his actual innocence of the crime. *Ex parte Franklin*, Application No. 44,521-01. The state habeas application was eventually denied on April 10, 2002. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002). Franklin filed this federal petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Fort Worth Division, on September 9, 2003.[1]

D. Issues

By way of the instant petition, Franklin raises six grounds for relief:

(1) His restraint is illegal because the Texas Court of Criminal Appeals opinion in *Ex parte Franklin*, 72 S.W.3d 671 (Tex. Crim. App. 2002), was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court;

(2) His restraint is illegal because the Texas Court of Criminal Appeals opinion in *Ex parte Franklin* was based on an unreasonable determination of

[1] A prisoner represented by counsel in a habeas corpus proceeding is not entitled to the benefit of the "mailbox rule." *Cousin v. Lensing*, 310 F.3d 843, 847-49 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2277 (2003).

the facts in light of the evidence presented at the state trial court proceedings;

(3) His restraint is illegal because the appellate opinion in *Franklin v. Texas* No. 2-95-084-CR (Tex. App. – Fort Worth Oct. 18, 1996, pet. ref'd) (not designated for publication), regarding the trial court's denial of a mistrial following improper prosecutorial vouching was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court;

(4) His restraint is illegal because he is actually innocent, which violates the United States Constitution;

(5) His restraint is illegal because the complainant perjured herself at trial, which violated the due process clause of the Fifth and Fourteenth Amendments of the Unites [sic] States Constitution; and

(6) His restraint is illegal because he was convicted based on the complainant's perjury and evidence admitted because of this perjury, which violated the right to a fair trial clause under the Fifth and Fourteenth Amendments to the United States Constitution. (Second Amended Petition at 2-3.)

E. Rule 5 Statement

Dretke believes that Franklin has not sufficiently exhausted his state remedies as required by 28 U.S.C. § 2254(b) and (c) with regard to issues five and six listed above. (Resp't Answer at 7.) As a preliminary matter, however, the court considers Dretke's argument that the petition is time barred. (*Id.* at 8.)

F. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), effective April 24, 1996, imposes a one-year statute of limitations for filing a petition for federal habeas corpus relief. 28 U.S.C. § 2244(d). Section 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

Because the foundation of Franklin's claims is B.R.'s affidavit, which was discovered after his conviction became final, subsection (d)(1)(D) is applicable to the computation of the limitations period in this case – i.e., the date on which the factual predicate of his claims could have been discovered through the exercise of due diligence. Under this provision, the statute of limitations began on May 15, 1999, when Franklin's counsel was notified of and received a copy of B.R.'s affidavit, and expired one year later on May 15, 2000, absent any applicable tolling.[2, 3] Franklin's

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[2] Franklin argues that the limitations period should not begin until March 2003, at which time he obtained the affidavit of one of the jurors in the case, thus culminating an exhaustive legal and factual investigation into the case necessary to "lay the proper groundwork for the State and federal writs." The thrust of this federal petition is Franklin's assertion that he is actually innocent of the crime for which he was convicted. In support of his petition, he relies heavily on B.R.'s affidavit reflecting that she was not truthful at trial about her sexual history. As indicated above, Franklin was aware or should have been aware of the affidavit in question on, or shortly after, May 15, 1999, when the prosecutor provided a copy of the document to Franklin's counsel. The time is [sic] took Franklin to gather additional evidence in support of his petition is irrelevant to the commencement of the limitations period. *See Flanagan v. Johnson*, 154 F.3d 196, 198-99 (5th Cir. 1998).

[3] Franklin's state habeas application filed after limitations had already expired did not operate to toll the limitations period under § 2244(d)(2). *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Nor has Franklin demonstrated that he is entitled to equitable tolling, which is available only in rare and exceptional circumstances when an

(Continued on following page)

petition, filed on September 9, 2003, is therefore untimely. 28 U.S.C. § 2244(d).

II. RECOMMENDATION

Franklin's petition for writ of habeas corpus should be dismissed with prejudice as time-barred.

III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions, and recommendation within ten (10) days after the party has been served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate

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extraordinary factor beyond the petitioner's control prevents him from filing in a timely manner. *See Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). A claim of actual innocence is not a "rare and exceptional circumstance" justifying application of the equitable tolling doctrine. *See Cousin*, 310 F.3d at 849; *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). Franklin distinguishes between an "unsupported claim of actual innocence" and a "colorable claim of innocence" in an effort to persuade the court to apply equitable tolling to his case. (Second Amended Petition at 21-22; Pet'r Reply at 4-5.) *See Felder*, 204 F.3d at 171 n.8 (noting that petitioner, although alleging actual innocence, had not made a "showing" of actual innocence); *Alexander v. Johnson*, 217 F. Supp. 2d 780, 791-92 (S.D. Tex. 2001) (holding limitations equitably tolled because petitioner made a showing of actual innocence). No Fifth Circuit case law has been found, however, expressly requiring the court to make such a distinction.

Judge's proposed findings, conclusions, and recommendation until May 13, 2004. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions, and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(B)(1). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc op. on reh'g); *Carter v. Collins*, 918 F.2d 1198, 1203 (5th Cir. 1990).

IV. ORDER

Under 28 U.S.C. § 636, it is ORDERED that each party is granted until May 13, 2004, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections.

It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED this 22 day of April, 2004.

/s/ Charles Bleil
CHARLES BLEIL
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

72 S.W.3d 671 (Tex.Crim.App. 2002)

Ex Parte Brian Edward FRANKLIN, Applicant.

No. 74041.

Court of Criminal Appeals of Texas, En Banc.

April 10, 2002.

Neal Davis, Dick Deguerin, Houston, for Appellant.

Charles M. Mallin, Asst. DA, Fort Worth, for State.

Before the court en banc.

OPINION

MEYERS, J., delivered the opinion of the Court in which KELLER, P.J., PRICE, KEASLER, HERVEY, HOLCOMB, and COCHRAN, J.J. joined.

This is a post-conviction application for a writ of habeas corpus forwarded to this Court pursuant to Article 11.07, V.A.C.C.P. In 1995 applicant was convicted by a jury of aggravated sexual assault of a child under fourteen years of age. TEX. PENAL CODE § 22.021(a)(1)(B)(i), (a)(1)(B)(iii), and (a)(2)(B). His punishment was assessed at life imprisonment. The Second Court of Appeals affirmed. *Franklin v. State*, No. 2-95-084-CR (Tex.App.-Fort Worth Oct. 18, 1996, pet. ref'd) (not designated for publication).

In 1999 applicant filed a post-conviction application for a writ of habeas corpus claiming that newly discovered evidence shows him to be actually innocent of the crime for which he was convicted. The trial court conducted a

hearing in which it heard testimony regarding the new evidence presented by applicant. When the transcript of applicant's initial hearing arrived, we determined that while the trial court's findings were based upon the correct level of confidence, *clear and convincing,* the standard to which this level applied was not correctly evaluated. The habeas judge's conclusion was stated as follows:

> [Applicant] has shown, through clear and convincing evidence, that [the newly discovered evidence], superimposed over the weak inculpatory evidence at his trial, *create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial.*

District Court's Findings of Fact, Conclusions of Law, and Order of the Court, Conclusions of Law 15 (emphasis added). Instead, we stated, that the proper test is whether applicant has shown "by clear and convincing evidence that *no reasonable juror would have convicted him in light of the new evidence.*" *Ex parte Elizondo,* 947 S.W.2d 202, 209 (Tex.Crim.App.1996) (emphasis added). Accordingly, in an unpublished per curiam opinion on September 12, 2001, we held this writ application in abeyance and ordered the trial court to reconsider applicant's claim in light of the proper test. We also ordered a supplemental transcript containing any affidavits, the transcription of the court reporter's notes from any interrogatories or hearings held, along with the trial court's revised findings of fact and conclusions of law. The transcript directed in the order is before us, together with the trial court's findings of fact and conclusions of law, and we can now proceed to decide the issue with finality.

I.

On April 13, 1994, B.R., the complainant, made a report to a teacher at school that she had been raped by applicant. The teacher called Child Protective Services. Applicant was subsequently charged and indicted for aggravated sexual assault of a child.

The trial commenced in February of 1995. At trial B.R. testified that one evening in March of 1994,[1] applicant raped her in the backyard of her father's house.[2] At the time, B.R. was thirteen years old. Applicant was a friend of the family and often visited B.R.'s father. B.R. testified that her father and his girlfriend were inside the house during the rape. She did not tell her father and his girlfriend about the experience after she returned to the house. Applicant testified that prior to the time of the sexual assault, she had never had sexual relations with anyone.

B.R.'s mother, G.G., was also called as a state's witness. She testified that the following day after B.R. returned from visiting her father during spring break in March, she found a pair of blood-stained underwear in the laundry that B.R. brought home. She stated that B.R. had her period two weeks prior to the day that she found the stained underwear. She noticed that the stain was a brighter red than that of the color of menstrual blood. The underwear, however, was not produced at trial because

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[1] The exact date of the alleged offense was never determined at trial.

[2] B.R.'s parents were divorced. Although she lived with her mother, her father was given court-ordered visitation rights.

G.G. had bleached them and could no longer differentiate that pair from other pairs of B.R.'s underwear.

Dr. Jan Lamb, the doctor who examined B.R. on April 20, 1994, following her outcry, testified that B.R. told her that she had been raped by applicant in March of 1994. In addition, she stated that the examination indicated that there was a rupture in a certain area of the hymen indicative of blunt force trauma and that the injury observed on B.R. would be consistent with her bleeding at the time of the offense. Such blood, she stated, would have been bright red in color from rupturing capillaries as opposed to the darker color of menstrual blood. On cross-examination Lamb admitted that blunt force trauma is not in itself an indication that someone has been raped and that you could find the same thing after a person has engaged in sexual intercourse for the first time. Since the exam was removed from the exact time of the assault, no forensic evidence was collected.

Constance Patton, a forensic serologist with the Tarrant County Medical Examiner's Office was called as a defense witness. She testified that blood on clothing gets darker in color the older the stain is and that if a stain is bright red, it is an indicator that the blood has not been present for a very long period of time. She explained that within six to eight hours, a blood stain on clothing is going to start to turn dark red to a brownish color.

Applicant did not testify at the trial. The jury found applicant guilty of aggravated sexual assault of a child and assessed punishment at life imprisonment.

In May of 1998 the Tarrant County District Attorney's Office notified applicant's trial counsel that it had received an affidavit from the police in which B.R. stated that she

had been sexually assaulted by her step-father from the time when she was six years old until the time that her mother moved her away from her step-father.[3] After receiving this information, applicant filed the present application for a post-conviction writ of habeas corpus based on newly discovered evidence.

The district court conducted a habeas hearing in which several witnesses were called to testify. Applicant first called Rose Salinas, the lead prosecutor in applicant's trial, to testify.[4] She stated that at the time she prosecuted applicant, she felt that B.R. was a credible witness. But if she had found out B.R. had lied to her during the trial, she testified that her opinion as to B.R.'s credibility would have changed. Moreover, she never would have been able to offer the medical evidence that was introduced at trial against applicant. On cross-examination she testified that the fact that there was another perpetrator would have not prevented her from trying the case and that she would have still prosecuted the case without the medical testimony. When asked by the trial court judge whether she would have moved to dismiss the case once she found out B.R. had lied to her she stated, "[H]ad we been in trial and this child had committed perjury and I found out about it after the fact, what I am saying is I might have moved to dismiss the case. And I'm very serious about the fact that that's a very strong possibility that it would have happened."

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[3] The period of abuse, which started before applicant assaulted B.R. and continued afterwards, lasted for approximately ten years.

[4] At the time of the habeas hearing, Salinas was no longer with the Tarrant County District Attorney's office but was working as an attorney in private practice.

Applicant also called Dr. Jan Lamb as its witness. She testified that if she had known that B.R. was also sexually assaulted by her step-father, she would not have been able to testify at trial as to which incident caused B.R. to have had blunt force trauma to her hymen. On cross-examination when asked if the knowledge that B.R. did not disclose the abuse by her step-father changed her opinion of B.R.'s credibility she stated "no." She explained that it is not unusual for children who are victims of sexual abuse not to discuss their sexual abuse. In addition, she also explained that children who have been sexually victimized are much more easily re-victimized due to the fact that they have very poor emotional, psychological and physical boundaries.

Applicant was also called as a witness. He produced various receipts and a phone bill in order to provide an alibi for the time period during which it was believed that the offense occurred. Although available at the time, none of these documents were introduced at applicant's trial.

B.R. was called by the State to testify. She stated that aside from the statement that she had never engaged in sexual intercourse before, everything else to which she testified during applicant's trial was true. She testified that the reason that she did not tell anyone about the sexual abuse she suffered by her step-father, J.G., was that she was afraid of him. She explained that she was unable to tell Ms. Salinas, Dr. Lamb, or counselors that she was being abused by J.G. due to the fact that he would almost always accompany her to the meetings. He was even in the room the day on which Dr. Lamb conducted the sexual assault examination. Moreover, she testified that during the couple of times that J.G. did not accompany her to the appointments, he would insist that she tell him

what had happened during the meetings. He was angry when he found out that B.R. had reported the sexual assault by applicant because he was afraid that people would find out about his own actions. On cross-examination, B.R. stated that contact with J.G. had also caused her to bleed on a few occasions, but not as much as she bled following the assault by applicant.

Initially the habeas judge concluded that applicant "has shown, through clear and convincing evidence, that [the newly discovered evidence] superimposed over the weak inculpatory evidence at his trial, create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial." District Court's Findings of Fact, Conclusions of Law, and Order of the Court, Conclusions of Law 15. We ordered the trial court to reconsider applicant's claim in light of the test expounded in *Elizondo*. In its supplemental order the trial court concluded that "Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence." District Court's Supplemental and Revised Conclusions of Law and Order of the Court, Conclusions of Law 6.[5]

II.

In *State ex. rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 397 (Tex.Crim.App.1994), we accepted the

[5] Although this Court is not bound by the findings of the trial court in post-conviction habeas corpus proceedings, such findings are considered if supported by the record. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex.Crim.App.1997). We find in the present case that although the trial court properly applied the narrow holding of *Elizondo*, it failed to take into account its greater purpose.

proposition that the execution of an innocent person would constitute a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, we held that a post-conviction application for a writ of habeas corpus was an appropriate vehicle for a convicted defendant sentenced to death to assert a claim of actual innocence. *Id.* at 398. Approximately two years later in *Elizondo* we were presented with the issue of whether a claim of actual innocence was cognizable by this Court in a post-conviction habeas corpus proceeding when the punishment assessed is not death but confinement. *Elizondo*, 947 S.W.2d at 204. We concluded that the basis for entertaining a post-conviction application for a writ of habeas corpus claim of actual innocence is not peculiar to capital cases in that the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of an innocent person; thereby making claims of actual innocence cognizable by this Court in post-conviction habeas corpus proceedings whether the punishment assessed is death or confinement. *Id.* at 205.

Claims of actual innocence are categorized either as *Herrera*-type claims or *Schlup*-type claims. *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Elizondo*, 947 S.W.2d at 208. A *Herrera*-type claim involves a substantive claim in which applicant asserts his bare claim of innocence based solely on newly discovered evidence. *Schlup*, 513 U.S. at 314, 115 S.Ct. 851; *See also Elizondo*, 947 S.W.2d at 208. A *Schlup*-type claim, on the other hand, is a procedural claim in which applicant's claim of innocence does not provide a

basis for relief, but is tied to a showing of constitutional error at trial. *Schlup*, 513 U.S. at 314, 115 S.Ct. 851.[6] The two claims require applicants to meet different burdens in order to obtain habeas relief.

In *Schlup*, the petitioner asserted a claim of actual innocence by claiming that constitutional error deprived the jury of critical evidence that would have established his innocence. *Id.* at 301, 115 S.Ct. 851. Before addressing the merits of Schlup's claim, the Supreme Court discussed the importance of distinguishing between the type of claim asserted by Schlup versus the type of claim asserted by the petitioner in *Herrera*. In *Herrera*, the petitioner based his claim of actual innocence on newly discovered evidence that showed that his brother committed the crime for which he was convicted. *Herrera*, 506 U.S. at 396, 113 S.Ct. 853. The Court expounded upon the difference between the two situations:

> Schlup's claim thus differs in at least two important ways from that presented in *Herrera*. First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."

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[6] *See generally* Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L.REV. 142 (1970) (arguing that "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a cognizable claim of innocence").

> More importantly, a court's assumptions about the validity of the proceedings that resulted in a conviction are fundamentally different in Schlup's case than in Herrera's. In *Herrera,* petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error free. In such a case, when a petitioner has been "tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants," it is appropriate to apply an "'extraordinarily high'" standard of review.
>
> * * *
>
> Consequently, Schlup's evidence of innocence need carry less of a burden. In Herrera (on the assumption that petitioner's claim was, in principle, legally well founded), the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" *even if* his conviction was the product of a fair trial. For Schlup, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was a product of a fair trial.

Schlup, 513 U.S. at 315-16, 115 S.Ct. 851 (citations omitted). The Court concluded that in a *Schlup*-type situation, the petitioner must show that the constitutional error "probably resulted" in the conviction of one who was actually innocent. *Id.* at 326-27, 115 S.Ct. 851. The Court articulated the meaning of probably resulted as follows: "The petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327, 115 S.Ct. 851; *see also Elizondo*, 947 *S.* W.2d at 209. For a *Herrera*-type claim,

however, the bare claim of innocence would fail unless the court was convinced that the new facts "unquestionably establish" applicant's innocence. *Schlup*, 513 U.S. at 317, 115 S.Ct. 851. The Court failed to elaborate, however, as to the level of confidence invoked by the use of the phrase "unquestionably establish."

In *Elizondo* applicant presented this Court with a *Herrera*-type claim. Applicant raised a claim of actual innocence based upon the recantation of testimony given by one of the victims of a crime for which applicant was convicted. We determined that the standard set by this Court in *Holmes*, which was decided prior to *Schlup*, made it "theoretically impossible" for any habeas applicant to gain relief. *Elizondo*, 947 S.W.2d at 205. In *Holmes* we held that "in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." 885 S.W.2d at 398. As such, we turned to *Schlup* for guidance and modified the standard to be applied in *Herrera*-type claims. We determined the "unquestionably establish" language as meaning the same thing as "clear and convincing." *Elizondo*, 947 S.W.2d at 209.

III.

In the present case, applicant does not raise any procedural claims attacking the constitutionality of his trial proceedings. Instead, he asserts a *Herrera*-type claim in which he argues that newly discovered evidence, B.R.'s admission that she was sexually assaulted by her

step-father, entitles him to habeas relief. Applicant cites to the test set forth in *Elizondo*.

In *Elizondo* we held that an applicant asserting a *Herrera*-type claim must show *by clear and convincing evidence* that no reasonable juror would have convicted him in light of the newly discovered evidence. *Id.* Today we take this opportunity to explain the type of evidence that is required by this Court in order to succeed on a *Herrera*-type claim. Although not explicitly stated in the holding, it is clear that *Elizondo* requires that applicants presenting *Herrera*-type claims offer evidence that goes towards affirmatively proving applicant's innocence. In *Elizondo* we explained:

> Because, in evaluating a habeas claim that newly discovered evidence or available evidence proves the applicant to be innocent of the crime for which he was convicted, our task is to assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, we must necessarily weigh such *exculpatory* evidence against the evidence of guilt adduced at trial.

Id. at 206 (emphasis added). In addition, when discussing a suitable standard for describing applicant's burden of proof in a collateral proceeding where he does not attack the rationality of a factfinder's verdict, we cited to the formulation described by Justice Blackmun in his dissent in *Herrera* where he explained that applicants must produce evidence that proves their innocence and not merely raises doubt about their guilt:

> The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, but once the government has done so, the burden of

> proving innocence must shift to the convicted defendant. The actual-innocence inquiry is therefore distinguishable from review for sufficiency of the evidence, where the question is not whether the defendant is actually innocent but whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt. When a defendant seeks to challenge the determination after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence not just raising doubt about his guilt.

506 U.S. at 443, 113 S.Ct. 853 (Blackmun, J., dissenting) (citations omitted). Finally, when discussing the grounds on which we afforded applicant relief in *Elizondo*, we explained, "Robert's recantation not only voids his trial testimony which implicated applicant, but constitutes *affirmative evidence* of applicant's innocence. We are convinced by clear and convincing evidence that no rational jury would convict him in light of the new evidence." *Elizondo*, 947 S.W.2d at 210 (emphasis added). It is apparent that our holding in *Elizondo* was meant to act as a mechanism for freeing the innocent, not as a vehicle for out-of-time motions for new trial.

A conviction that results from a constitutionally error-free trial is entitled to the greatest respect. *Id.* at 209. Accordingly, we hold that when an applicant asserts a *Herrera*-type claim based on newly discovered evidence, the evidence presented must constitute affirmative evidence of the applicant's innocence.[7] Once the applicant

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[7] In addition to trustworthy witness recantations, other examples of such evidence may include exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851.

provides such evidence, it is then appropriate to proceed with a determination of whether the applicant can prove by clear and convincing evidence that no reasonable juror would have convicted him in light of the newly discovered evidence.

Applicant fails to present any new evidence aside from the fact that B.R. now alleges that she was also sexually assaulted by her step-father. B.R. does not recant her trial testimony. Rather she continues to allege that applicant sexually assaulted her. In her affidavit she makes this assertion on two separate occasions. She first states, "When I was 13 years old I was sexually abused by another person and when [J.G.] found out about it he was mad at me and said I must have wanted it because I didn't tell him about it. Every few months [J.G.] would get mad at me about it again." In addition she states, "I have not had sexual intercourse with anyone else but [J.G.] and the time before when I was sexually assaulted and I was 13 years old." Finally, at the habeas hearing she testified that she had been sexually assaulted by applicant.

Although applicant's evidence is important, it is limited to the impeachment of B.R.'s claim that she did not have sexual relations with other men. It certainly calls into question her veracity in general, but only collaterally affects her accusation against applicant. This evidence standing alone, however, it is not dispositive of applicant's claim of innocence.

Applicant's writ is based upon the theory espoused in *Herrera* and as such he must establish his innocence of the crime by clear and convincing evidence and not merely that he would be found not guilty by a subsequent jury. While there is no question that in an appropriate case the

principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust incarceration," *Engle v. Isaac*, 456 U.S. 107, 135, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1981), we find that applicant has not presented this Court with such a case. Applicant's claim is denied.

WOMACK, J., filed a concurring opinion.

JOHNSON, J., dissented.

WOMACK, J., filed a concurring opinion.

Today the Court again purports to rely on *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), as authority for the legitimacy of presenting a claim of newly-discovered evidence through habeas corpus. *Herrera* so clearly stands for the opposite proposition that one hardly knows whether to laugh or cry at this Court's perversion of it.

> The holdings of that case were: (1) Federal habeas corpus is not available for a claim of newly discovered evidence of innocence in the absence of a violation of constitutionally-required procedures. To require a new trial simply because a jury might acquit in light of the new evidence would not clearly produce a more reliable result, since the passage of time only diminishes the reliability of criminal adjudications. (2) Texas's 30 day limit to move for new trial on newly discovered evidence does not deny due process. (3) Executive clemency is the traditional "fail safe" remedy for late evidence of innocence. (4) Even if it were assumed for the sake of argument that a truly persuasive demonstration of actual innocence would render an execution unconstitutional so that federal habeas corpus

> would lie, Herrera's evidence fell far short of the extraordinarily high threshold showing that would be required. (Herrera's evidence was two witnesses who said that Herrera's brother, now dead, had admitted committing the crime.)

This is mighty thin sand on which to erect the holding . . . that due process (not the Cruel and Unusual Punishment Clause) would be violated by the execution of an innocent defendant, and that state habeas corpus will lie to permit a defendant to present newly discovered evidence of innocence. And it is no support at all for the holdings in this case that due process is violated by the confinement of an innocent defendant, that post-conviction habeas corpus is available to correct errors of fact, that the defendant must prove his claim by no more than clear and convincing evidence, and that the evidence of a recanting witness might be sufficient.

[Because of these holdings] a convicted defendant in every criminal case (if it is a due process problem, there is no reason to limit it to felonies or to sentences of confinement), will now be allowed and encouraged to pursue the witnesses and get them to recant. If he does so, he can relitigate his case forever. And all this is supposed to be based on *Herrera*, where the Court said that habeas corpus was not available because, "'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). To conclude otherwise would

all but paralyze our system for enforcement of the criminal law."*

As the Court takes another small step down the path of paralysis, I can only respectfully concur.

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* *Ex parte Elizondo*, 947 S.W.2d 202, 215 (Tex.Cr.App.1997) (Womack, J., dissenting to denial of rehearing)

APPENDIX F

HABEAS TRIAL COURT NO. C-2-4267-0569160-A
HABEAS COURT OF CRIMINAL APPEALS NO. 74,041

EX PARTE	§	IN CRIMINAL DISTRICT
	§	COURT
	§	NUMBER TWO OF
	§	
BRIAN EDWARD	§	TARRANT COUNTY,
FRANKLIN	§	TEXAS

THE DISTRICT COURT'S SUPPLEMENTAL AND REVISED CONCLUSIONS OF LAW AND ORDER OF THE COURT

(Filed Nov. 5, 2001)

This Court's supplemental conclusions of law and order of the court are made pursuant to the Court of Criminal Appeals' September 12, 2001, per curiam opinion in this case. Upon consideration of all the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court enters the following supplemental and revised conclusions of law and order of the [sic] of this Court:

I. CONCLUSIONS OF LAW

1. No doubt, as the Tarrant County District Attorney's office conceded at oral argument in Franklin's case before the Court of Criminal Appeals, "There were infirmities and imperfections in the trial because the child lied on the stand." This responded to Judge Sharon Keller' question about whether Applicant Franklin received a fair trial.

2. The Court of Criminal Appeals' per curiam order specifically requests that this Court expressly apply the *Elizondo* standard – whether an actual innocence applicant has shown "by *clear and convincing evidence that no reasonable juror would have convicted* him in light of the new evidence" – for showing actual innocence in a *Herrera*-type claim. ***Ex Parte Elizondo v. State***, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (emphasis added).

3. As the Court of Criminal Appeals sets out in its per curiam order, the *Elizondo* standard replaced the *Holmes* standard created two years earlier. ***See State ex rel. Holmes v. Court of Appeals***, 885 S.W.2d 389, 398 (Tex. Crim. App.1994). The *Holmes* standard requires an actual innocence applicant to show that "based on the newly discovered evidence and the entire record before the jury that convicted him, *no rational trier of fact could find proof of guilt beyond a reasonable doubt*" ***Id.*** (emphasis added).

4. The per curiam concurrence asks this Court to examine the "new evidence" in two ways:

(1) Examine the new evidence and consider the fact of perjury to determine what the jury would do in light of the complainant's lowered credibility, and

(2) Examine the new evidence without consideration of the fact of perjury to determine what the jury would have done if it had heard "the truth" the first time around at trial.

5. **After examining the new evidence and considering the fact of perjury to determine what the jury would do in light of the complainant's**

lowered credibility, this Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. This Court reaches this conclusion based on the following facts, which have already been set out in the original findings of fact:

Finding of Fact 3: Before Applicant Franklin's trial, the prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb spoke at length on various occasions with Brandi Rachall. **T.C.R. 70; A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.** The Court finds that Brandi Rachall lied when she failed to inform them that she had sexual relations with John Guerrero before Applicant Franklin allegedly sexually assaulted her. ***See* A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.** Rose Anna Salinas pointed out at the habeas corpus hearing that Brandi Rachall "was not at a very tender age at the time we went to trial. She was not that little. She knew the importance of what we were doing in this courtroom. Absolutely knew it. She's a very smart, intelligent girl."

H.R.R. 23. Dr. Lamb testified at the habeas corpus hearing that minors are known to make false allegations of sexual assault. ***See* H.R.R.**

Finding of Fact 5: Rose Anna Salinas is a leading legal expert in Texas on sexual assault cases involving complainants who are children. Following her graduation from law school in 1989, she prosecuted criminal cases at the Tarrant County District Attorney's Office until 1998. **A. Exhibit 2; H.R.R. 3.** She was assigned to the Crimes Against Children Unit from 1992 to 1997. **A. Exhibit 2; H.R.R. 4.** She has been a frequent lecturer at seminars dealing with child abuse. **H.R.R. 5-6.** In 1997, she was recognized as a top prosecutor in Texas in child abuse cases. **H.R.R. 7-8.**

Finding of Fact 6: The Court finds that the State's case against Applicant Franklin was "difficult," in the words of Rose Anna Salinas, because of the little evidence supporting Brandi Rachall's story. ***See*** **T.C.R. 65-68, 86-89, 105-11; A. Exhibit 7; H.R.R. 21-23.**

Finding of Fact 7: Evidence showed that no eyewitnesses saw the alleged sexual assault. **IX T.R.R. 163;** ***See*** **H.R.R.**

Finding of Fact 8: No semen, hair, epithelial cells, or other trace evidence of Applicant Franklin was ever discovered or collected. **VIII T.R.R. 53; H.R.R 21;** ***See*** **H.R.R.**

Finding of Fact 9: Matt Rachall, who is Brandi Rachall's father, and her teacher never observed any physical signs

of injury, such as scratches or abrasions, to Brandi Rachall, despite her descriptions of a violent sexual assault and bruising on her face. **T.C.R. 73; VIII T.R.R. 211-12; XIII T.R.R. Exhibit 2.**

Finding of Fact 10: Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense. **T.C.R. 69-73; VIII T.R.R. 49, 134-37; IX T.R.R. 149; X T.R.R. 56; XIII T.R.R. Exhibits 2, 7.** These inconsistencies ultimately caused the State to obtain a superseding indictment that changed the date of the alleged offense from March 5 to March 12, 1994. ***See*** **T.C.R. 3, 6; H.R.R. 43.**

Finding of Fact 11: The Court finds that, except for Brandi Rachall's testimony, no evidence at either Applicant Franklin's trial or habeas corpus hearing was introduced to show that Applicant Franklin was in Brandi Rachall's presence at Matt Rachall's house between March 11 and March 20, 1994, even though Brandi Rachall and the State contended that the sexual assault occurred at her father's house sometime during this spring break period. ***See*** **T.C.R. 3, 6;** ***See*** **T.R.R.;** ***See*** **H.R.R. 45-46, 55-56;** ***See*** **H.R.R.**

Finding of Fact 12: The Court finds that witness testimony and corroborative evidence,

namely Applicant Franklin's sales receipts and employee time sheets, established that Applicant Franklin was never present with Brandi Rachall at her father's house between March 11 and March 20, 1994. ***See*** **VIII T.R.R. 149, 189-91; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** For example, during cross-examination at Applicant Franklin's trial, Matt Rachall was asked, "During that spring break week, do you remember whether or not the Defendant visited your home with his children?", to which Matt Rachall responded, "He did not" **VIII T.R.R. 149;** ***See also*** **VIII T.R.R. 189-91.** At the habeas corpus hearing, Matt Rachall testified that, to the best of his recollection, he never saw Applicant Franklin at Matt Rachall's house from March 11 to March 20, 1994. ***See*** **H.R.R.** Matt Rachall's testimony at the trial and habeas corpus hearing was based on calendars that he had made with the assistance of prosecutors Christy Jack and Rose Anna Salinas before Applicant Franklin's trial. ***Id.***; **XIII T.R.R. Exhibit 3.** Applicant Franklin's time sheets from Central Freight Lines showed that he worked every weekday in March 1994, from approximately 6:00 p.m. to midnight. **X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9.**

Finding of Fact 13: The Court finds that evidence at the trial and habeas corpus hearing revealed that March 6, 1994, was the only date in the entire month of March that Applicant Franklin was in Brandi Rachall's presence at her father's house. **VIII T.R.R. 149; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** The State and several witnesses, including Brandi Rachall, testified that the claimed sexual assault definitely did not occur on March 6, 1994. **VIII T.R.R. 200-01; IX T.R.R. 149;** ***See*** **H.R.R.**

Finding of Fact 14: The Court finds that, because of the little evidence supporting the claimed sexual assault, the State's case against Applicant Franklin rested in large part on Brandi Rachall's testimony and credibility at trial. As prosecutor Christy Jack stated in her summation at trial, "What it boils down to is: Do you believe Brandi Rachall? When you set everything aside, do you believe Brandi Rachall?" **XI T.R.R. 11-12.** Rose Anna Salinas stated at the habeas corpus hearing that Brandi Rachall's credibility was "very important" and a "primary factor" in the jury's decision to convict Applicant Franklin. **H.R.R. 28-30.**

Finding of Fact 15: During direct examination at Applicant Franklin's trial, Brandi Rachall reiterated that she had no sexual relations before Applicant

Franklin allegedly sexually assaulted her:

Q: Had you ever had sex before?

A: No.

IX T.R.R. 161. The Court finds that Brandi Rachall lied and committed perjury at Applicant Franklin's trial when she testified that she had no sexual relations before Applicant Franklin allegedly sexually assaulted her.

Finding of Fact 16: The Court finds that the State, to support Brandi Rachall's claim that Applicant Franklin sexually assaulted her, relied on testimony regarding only two pieces of physical evidence: a pair of her blood-stained underwear and a medical examination of her hymen that was conducted several weeks after the alleged offense. **A. Exhibit 2.**

Finding of Fact 17: Gena Guerrero, who is Brandi Rachall's mother, claimed that she discovered a bloodstain on Brandi Rachall's underwear on March 21, 1994, a full day after her daughter had returned home from a trip to Waco. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero stated that, after she bleached and washed the underwear, she realized the blood could not have been from menstruation since Brandi Rachall had her period two weeks earlier. **XIII**

T.R.R. Exhibit 6; A. Exhibit 8. Gena Guerrero explained that the bloodstain on the underwear was "extremely red" and "really red," in contrast to menstruation stains, which "are a darker red almost brown." ***Id.*** Dr. Lamb testified at trial that bleeding from a sexual assault would be "bright red," not the "brownish" color of menstrual blood. **VIII T.R.R. 61.**

Finding of Fact 18: Constance Patton, an expert serologist who worked several years for the crime lab of the Forth Worth Police Department, testified at trial and the habeas corpus hearing that a "bright red" bloodstain on the underwear indicated bleeding within the previous few hours. **X T.R.R. 77;** ***See*** **H.R.R.** She further stated that a bloodstain older than twenty four hours would appear "brown." ***Id.*** Dr. Lamb testified at the habeas corpus hearing that, in her experience, the "bright red" color of fresh blood quickly turns "brown" due to oxidation. ***See*** **H.R.R.**

Finding of Fact 19: The Court finds that witness testimony and corroborative evidence at the trial and habeas corpus hearing established that Gena Guerrero discovered the "extremely red" and "really red" bloodstain on the underwear approximately two weeks after Applicant Franklin had last been in Brandi Rachall's presence at Matt Rachall's house. **VIII**

T.R.R. 149, 189-91; IX T.R.R. 16-20; X T.R.R. 88; XIII T.R.R. Exhibits 3, 6, 9; A. Exhibits 8, 9; *See* H.R.R.

Finding of Fact 20: Because of her "delayed outcry," Brandi Rachall did not undergo a medical examination until several weeks after the alleged sexual assault. **T.C.R. 72-73; XIII T.R.R. Exhibit 2; A. Exhibit 3; H.R.R. 18, 45-46; *See* H.R.R.** Dr. Lamb, who performed the medical examination, focused on any damage to Brandi Rachall's hymen. **VIII T.R.R. 51-62; A. Exhibit 3; *See* H.R.R.** An "interruption of the [hymen] tissue at 11:00 and down between 5:00 and 6:00 o'clock" caused Dr. Lamb to testify that Brandi Rachall's hymen had been penetrated. ***Id.*** Operating under the assumption that Brandi Rachall had no sexual relations before the claimed sexual assault, Dr. Lamb wrote in her medical report and testified at trial that the hymen damage was consistent with Brandi Rachall's claim that Applicant Franklin had sexually assaulted her. ***Id.***

Finding of Fact 21: The Court finds that the trial record and Rose Anna Salinas' testimony at the habeas corpus hearing unquestionably showed that the State's trial preparation, theory, and presentation were all based on Brandi Rachall's repeated

assertions that she had no sexual relations before the alleged sexual assault. Rose Anna Salinas specifically testified that Brandi Rachall's supposed virginity before the alleged offense was "one of the most crucial factors" at Applicant Franklin's trial. **H.R.R. 28.** Rose Anna Salinas further stated that, if she had known that Brandi Rachall engaged in sexual relations before Applicant Franklin allegedly committed the offense, "every evaluation . . . made during the trial, during the preparation for the trial would have changed." **H.R.R. 42.**

Finding of Fact 22: The Court finds that the State introduced evidence to the jury at Applicant Franklin's trial about Brandi Rachall's hymen damage to show or at least suggest that it was the sole result of Applicant Franklin sexually assaulting her. **VIII T.R.R. 51-62; XII T.R.R. 165-66; A. Exhibits 2, 3; *See* H.R.R.** At the habeas corpus hearing, Rose Anna Salinas testified that she "presented the case to the jury . . . with the theory that changes in the hymen of Brandi Rachall were due to the assault or claimed assault by Brian Franklin" and "that was the theory of the . . . Prosecution all the way through." **H.R.R. 14.**

Finding of Fact 23: The Court finds that the State introduced evidence to the jury about Brandi Rachall's lack of

prior relationship with any males to show or at least suggest that she was a virgin before Applicant Franklin allegedly sexually assaulted her. **IX T.R.R. 135-37; XI T.R.R: 13-15.** Rose Anna Salinas testified that "the questions . . . asked about whether Brandi had had any other boyfriends was another way of asking and obtaining her answer that she had not had sex before . . . I wanted to establish she was very sexually naive and had no other experiences other than this sexual abuse by Brian Franklin." **H.R.R.**

Finding of Fact 24: The Court finds that the State introduced evidence to the jury about Brandi Rachall's blood-stained underwear to show or at least suggest that it was the sole result of Applicant Franklin allegedly penetrating and breaking her hymen. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibits 2, 8; H.R.R. 50-51;** ***See*** **H.R.R.**

Finding of Fact 25: The Court finds that the State introduced evidence to the jury about Brandi Rachall having nightmares to show or at least suggest that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 28-29, 197; XI T.R.R. 17, 41;** ***See*** **H.R.R.**

Finding of Fact 26: The Court finds that the State introduced evidence to the jury

about Brandi Rachall having migraines to show or at least suggest to the jury that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 29-30; *See* H.R.R.**

Finding of Fact 27: The Court finds that the State introduced evidence to the jury about Brandi Rachall no longer wearing clothes that "[camel above her ankle" to show or at least suggest that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27-28. *See* H.R.R.**

Finding of Fact 28: The Court finds that the State introduced evidence to the jury about Brandi Rachall going to counseling to show or at least suggest to that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27, 197; H.R.R. 14-16; *See* H.R.R.**

Finding of Fact 29: On February 24, 1995, the jury found Applicant Franklin guilty and sentenced him to life imprisonment. **T.C.R. 224; XI T.R.R. 46; XII T.R.R. 177.**

Finding of Fact 31: On May 15, 1998, prosecutor Christy Jack sent defendant's trial counsel Leonard Schilling a letter stating, "Please find enclosed information that was brought to our attention on May 13, 1998, which may or may not concern the Brian

Franklin case." **A. Exhibits 5, 10, 11.**

Finding of Fact 32: Sent with prosecutor Christy Jack's letter were various affidavits, police investigation notes, and other information relating to new claims that Brandi Rachall had recently made about having sexual relations with John Guerrero, who was her stepfather at the time. ***See id.***

Finding of Fact 33: In an affidavit dated May 5, 1998, Brandi Rachall stated that she had daily sexual relations with her stepfather for over eleven years. **A. Exhibit 6.**

Finding of Fact 34: This eleven-year period of daily sexual relations covered the time before, during, and after the alleged sexual assault that Brandi Rachall claimed Applicant Franklin committed on her. ***Id.***

Finding of Fact 35: The Court finds that Brandi Rachall's May 1998 affidavit to police directly contradicted her own testimony, as well as the testimony of other witnesses, adduced before and during Applicant Franklin's trial. ***Id.***, ***See*** **T.C.R.**, ***See*** **T.R.R., A. Exhibits 2, 3, 10, 11;** ***See*** **H.R.R.**

Finding of Fact 36: The Court finds that the diligent pre-trial and trial investigations of Applicant Franklin's counsel did not and could not have uncovered this new evidence regarding Brandi

Rachall's sexual relations with John Guerrero. ***See*** **A. Exhibits 10, 11.**

Finding of Fact 37: The Court finds that whether a complainant in a sexual assault case has a single perpetrator or multiple perpetrators will determine what evidence the State will introduce at trial. Rose Anna Salinas testified at the habeas corpus hearing that it is "important to know the sexual history, if there is one, of a child who is the complaining witness in a case of sexual assault . . . One of the reasons you need to know that is because like this particular case . . . you may not be able to bring that medical evidence to a jury . . . Another reason is if you have psychological type of trauma that is evidence . . . you may be limited." **H.R.R. 9-10.**

Finding of Fact 38: The Court finds that, in light of the new evidence, testimony about the damage to Brandi Rachall's hymen would not have been introduced at Applicant Franklin's trial. Rose Anna Salinas testified, "I certainly would have never been able to offer the medical evidence that I offered against Brian Franklin. I would have never been able to offer that against him. I wouldn't have presented it. I couldn't. I could not say that the injury was caused by him . . . I can tell you right now that that medical evidence would not have been offered against him."

H.R.R 24-25, 27; A. Exhibits 2, 3, 10, 11; *See* H.R.R.

Finding of Fact 39: The Court finds that, in light of new evidence, testimony about Brandi Rachall's bloodstained panties would not have been introduced at the trial. Rose Anna Salinas testified that it was "very likely that the testimony [about the bloodstained underwear] ... would not have been admissible." **H.R.R. 51; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

Finding of Fact 40: The Court finds that, in light of the new evidence, Brandi Rachall almost surely would have never testified at trial. Rose Anna Salinas testified, "To me [Brandi Rachall] was very credible ... [I] believed her ... Otherwise, I would have never gone into court with this case," "I just know that I no longer find her credible," and "her credibility as presented to this jury [at Applicant Franklin's trial] was deeply and adversely affected." **H.R.R. 23, 49, 61.**

Finding of Fact 41: The Court finds that, in light of the new evidence, the State would have dismissed the case against Applicant Franklin or at the very least requested a mistrial at Applicant Franklin's trial. Rose Anna Salinas stated in her affidavit, "Had I known that ... Brandi Rachall intentionally withheld evidence of her previous sexual contact with John

Guerrero, I would have had such serious doubts about Applicant Franklin's guilt that I would have immediately dismissed the charges against him." **A. Exhibit 2.** At the habeas corpus hearing, Rose Anna Salinas testified, "I thought I could evaluate [Applicant Franklin's] case properly to prosecute it and obviously I was wrong. [Brandi Rachall] fooled me" and that "I might have moved to dismiss this case. And that's a very strong possibility that would have happened . . . [At] the very least [I] would have joined the defense in a motion for mistrial." **H.R.R. 54, 63.**

Finding of Fact 42: The Court finds that . . . Rose Anna Salinas testified at several points during the habeas corpus hearing that Brandi Rachall's lies concerning her sexual history "permeated the case" and "adversely affected . . . the integrity of the jury's verdict." **H.R.R. 30, 48.** At the end of her testimony, Rose Anna Salinas stated, "My opinion is that I don't believe [Applicant Franklin] got a fair trial" and "the bottom line is this jury verdict cannot be trusted because of the false information." **H.R.R. 62, 67.**

6. **After examining the new evidence without considering the fact of the complainant's perjury to determine what the jury would have done if it had heard "the truth" the first time around at trial, this**

Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. This Court reaches this conclusion based on the following facts, which have also been set out in the original findings of fact and which have been cited above under conclusion of law "5.":

Finding of Fact 3: Before Applicant Franklin's trial, the prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb spoke at length on various occasions with Brandi Rachall. **T.C.R. 70; A. Exhibits 2, 3,10,11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.**

Finding of Fact 5: Rose Anna Salinas is a leading legal expert in Texas on sexual assault cases involving complainants who are children. Following her graduation from law school in 1989, she prosecuted criminal cases at the Tarrant County District Attorney's Office until 1998. **A. Exhibit 2; H.R.R. 3.** She was assigned to the Crimes Against Children Unit from 1992 to 1997. **A. Exhibit 2; H.R.R. 4.** She has been a frequent lecturer at seminars dealing with child abuse. **H.R.R. 5-6.** in 1997, she was recognized as a top prosecutor in Texas in child abuse cases. **H.R.R. 7-8.**

Finding of Fact 6: The Court finds that the State's case against Applicant Franklin

was "difficult," in the words of Rose Anna Salinas, because of the little evidence supporting Brandi Rachall's story. ***See*** **T.C.R. 65-68, 86-89, 105-11; A. Exhibit 7; H.R.R. 21-23.**

Finding of Fact 7: Evidence showed that no eyewitnesses saw the alleged sexual assault. **IX T.R.R. 163;** ***See*** **H.R.R.**

Finding of Fact 8: No semen, hair, epithelial cells, or other trace evidence of Applicant Franklin was ever discovered or collected. **VIII T.R.R. 53; H.R.R 21;** ***See*** **H.R.R.**

Finding of Fact 9: Matt Rachall, who is Brandi Rachall's father, and her teacher never observed any physical signs of injury, such as scratches or abrasions, to Brandi Rachall, despite her descriptions of a violent sexual assault and bruising on her face. **T.C.R. 73; VIII T.R.R. 211-12; XIII T.R.R. Exhibit 2.**

Finding of Fact 10: Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense. **T.C.R. 69-73; VIII T.R.R. 49, 134-37; IX T.R.R. 149; X T.R.R. 56; XIII T.R.R. Exhibits 2, 7.** These inconsistencies ultimately caused the State to obtain a superseding indictment that changed the date of the alleged offense from March 5 to March 12, 1994. ***See*** **T.C.R. 3, 6; H.R.R. 43.**

Finding of Fact 11: The Court finds that, except for Brandi Rachall's testimony, no evidence at either Applicant Franklin's trial or habeas corpus hearing was introduced to show that Applicant Franklin was in Brandi Rachall's presence at Matt Rachall's house between March 11 and March 20, 1994, even though Brandi Rachall and the State contended that the sexual assault occurred at her father's house sometime during this spring break period. ***See*** **T.C.R. 3, 6;** ***See*** **T.R.R.;** ***See*** **H.R.R. 45-46, 55-56;** ***See*** **H.R.R.**

Finding of Fact 12: The Court finds that witness testimony and corroborative evidence, namely Applicant Franklin's sales receipts and employee time sheets, established that Applicant Franklin was never present with Brandi Rachall at her father's house between March 11 and March 20, 1994. ***See*** **VIII T.R.R. 149, 189-91; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** For example, during cross-examination at Applicant Franklin's trial, Matt Rachall was asked, "During that spring break week, do you remember whether or not the Defendant visited your home with his children?", to which Matt Rachall responded, "He did not." **VIII T.R.R. 149;** ***See also*** **VIII T.R.R. 189-91.** At the habeas corpus hearing, Matt Rachall testified that,

to the best of his recollection, he never saw Applicant Franklin at Matt Rachall's house from March 11 to March 20, 1994. ***See*** **H.R.R.** Matt Rachall's testimony at the trial and habeas corpus hearing was based on calendars that he had made with the assistance of prosecutors Christy Jack and Rose Anna Salinas before Applicant Franklin's trial. *Id.*; **XIII T.R.R. Exhibit 3.** Applicant Franklin's time sheets from Central Freight Lines showed that he worked every weekday in March 1994, from approximately 6:00 p.m. to midnight. **X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9.**

Finding of Fact 13: The Court finds that evidence at the trial and habeas corpus hearing revealed that March 6, 1994, was the only date in the entire month of March that Applicant Franklin was in Brandi Rachall's presence at her father's house. **VIII T.R.R. 149; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** The State and several witnesses including Brandi Rachall, testified that the claimed sexual assault definitely did not occur on March 6, 1994. **VIII T.R.R. 200-01; IX T.R.R. 149;** ***See*** **H.R.R.**

Finding of Fact 16: The Court finds that the State, to support Brandi Rachall's claim that Applicant Franklin sexually assaulted her, relied on testimony

regarding only two pieces of physical evidence: a pair of her blood-stained underwear and a medical examination of her hymen that was conducted several weeks after the alleged offense. **A. Exhibit 2.**

Finding of Fact 17: Gena Guerrero, who is Brandi Rachall's mother, claimed that she discovered a bloodstain on Brandi Rachall's underwear on March 21, 1994, a full day after her daughter had returned home from a trip to Waco. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero stated that, after she bleached and washed the underwear, she realized the blood could not have been from menstruation since Brandi Rachall had her period two weeks earlier. **XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero explained that the bloodstain on the underwear was "extremely red" and "really red," in contrast to menstruation stains, which "are a darker red almost brown." ***Id.*** Dr. Lamb testified at trial that bleeding from a sexual assault would be "bright red," not the "brownish" color of menstrual blood. **VIII T.R.R. 61.**

Finding of Fact 18: Constance Patton; an expert serologist who worked several years for the crime lab of the Forth Worth Police Department, testified at trial and the habeas corpus hearing that a "bright red" bloodstain on the

underwear indicated bleeding within the previous few hours. **X T.R.R. 77;** ***See*** **H.R.R.** She further stated that a bloodstain older than twenty four hours would appear "brown." ***Id.*** Dr. Lamb testified at the habeas corpus hearing that, in her experience, the "bright red" color of fresh blood quickly turns "brown" due to oxidation. ***See*** **H.R.R.**

Finding of Fact 19: The Court finds that witness testimony and corroborative evidence at the trial and habeas corpus hearing established that Gena Guerrero discovered the "extremely red" and "really red" bloodstain on the underwear approximately two weeks after Applicant Franklin had last been in Brandi Rachall's presence at Matt Rachall's house. **VIII T.R.R. 149, 189-91; IX T.R.R. 16-20; X T.R.R. 88; XIII T.R.R. Exhibits 3, 6, 9; A. Exhibits 8, 9;** ***See*** **H.R.R.**

Finding of Fact 20: Because of her "delayed outcry," Brandi Rachall did not undergo a medical examination until several weeks after the alleged sexual assault. **T.C.R. 72-73; XIII T.R.R. Exhibit 2; A. Exhibit 3; H.R.R. 18, 45-46;** ***See*** **H.R.R.** Dr. Lamb, who performed the medical examination, focused on any damage to Brandi Rachall's hymen. **VIII T.R.R. 51-62; A. Exhibit 3;** ***See*** **H.R.R.** An "interruption of the [hymen] tissue at 11:00 and down

between 5:00 and 6:00 o'clock" caused Dr. Lamb to testify that Brandi Rachall's hymen had been penetrated. ***Id.***

Finding of Fact 21: Rose Anna Salinas specifically testified that Brandi Rachall's supposed virginity before the alleged offense was "one of the most crucial factors" at Applicant Franklin's trial. **H.R.R. 28.** Rose Anna Salinas further stated that, if she had known that Brandi Rachall engaged in sexual relations before Applicant Franklin allegedly committed the offense, "every evaluation . . . made during the trial, during the preparation for the trial would have changed." **H.R.R. 42.**

Finding of Fact 22: The Court finds that the State introduced evidence to the jury at Applicant Franklin's trial about Brandi Rachall's hymen damage to show or at least suggest that it was the sole result of Applicant Franklin sexually assaulting her. **VIII T.R.R. 51-62; XII T.R.R. 165-66; A. Exhibits 2, 3;** ***See*** **H.R.R.** At the habeas corpus hearing, Rose Anna Salinas testified that she "presented the case to the jury . . . the theory that changes in the hymen of Brandi Rachall were due to the assault or claimed assault by Brian Franklin" and "that was the theory of the . . . Prosecution all the way through." **H.R.R. 14.**

Finding of Fact 23: The Court finds that the State introduced evidence to the jury about Brandi Rachall's lack of prior relationship with any males to show or at least suggest that she was a virgin before Applicant Franklin allegedly sexually assaulted her. **IX T.R.R. 135-37; XI T.R.R. 13-15.** Rose Anna Salinas testified that "the questions . . . asked about whether Brandi had had any other boyfriends was another way of asking and obtaining her answer that she had not had sex before . . . I wanted to establish she was very sexually naive and had no other experiences other than this sexual abuse by Brian Franklin." **H.R.R. 17.**

Finding of Fact 24: The Court finds that the State introduced evidence to the jury about Brandi Rachall's blood-stained underwear to show or at least suggest that it was the sole result of Applicant Franklin allegedly penetrating and breaking her hymen. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibits 2, 8; H.R.R. 50-51; *See* H.R.R.**

Finding of Fact 25: The Court finds that the State introduced evidence to the jury about Brandi Rachall having nightmares to show or at least suggest that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX**

T.R.R. 28-29, 197; XI T.R.R. 17, 41; *See* H.R.R.

Finding of Fact 26: The Court finds that the State introduced evidence to the jury about Brandi Rachall having migraines to show or at least suggest to the jury that they were the sole result of Applicant Franklin allegedly sexually assaulting her. IX T.R.R. 29-30; *See* H.R.R.

Finding of Fact 27: The Court finds that the State introduced evidence to the jury about Brandi Rachall no longer wearing clothes that "[came] above her ankle" to show or at least suggest that it was the sole result of Applicant Franklin allegedly sexually assaulting her. IX T.R.R. 27-28. *See* H.R.R.

Finding of Fact 28: The Court finds that the State introduced evidence to the jury about Brandi Rachall going to counseling to show or at least suggest to that it was the sole result of Applicant Franklin allegedly sexually assaulting her. IX T.R.R. 27, 197; H.R.R. 14-16; *See* H.R.R.

Finding of Fact 38: The Court finds that, in light of the new evidence, testimony about the damage to Brandi Rachall's hymen would not have been introduced at Applicant Franklin's trial. Rose Anna Salinas testified, "I certainly would have never been able to offer the medical evidence that I offered

against Brian Franklin. I would have never been able to offer that against him. I wouldn't have presented it. I couldn't. I could not say that the injury was caused by him . . . I can tell you right now that that medical evidence would not have been offered against him." **H.R.R 24-25, 27; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

Finding of Fact 39: The Court finds that, in light of new evidence, testimony about Brandi Rachall's bloodstained panties would not have been introduced at the trial. Rose Anna Salinas testified that it was "very likely that the testimony [about the bloodstained underwear] . . . would not have been admissible." **H.R.R. 51; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

7. **The Court concludes that, in light of the new evidence, Applicant Franklin is being unlawfully confined and is constitutionally entitled to a new trial under *Elizondo*.** As chief prosecutor Rose Anna Salinas eloquently stated at the end of the habeas corpus hearing, the new evidence:

> goes to something much more serious for me. And I think anybody who knows me knows that I take it very seriously when I ask a jury to send someone to prison for life. I have to be sure about my case. I always prosecuted cases that way. And to find out years later that this information has now come forward and that there is someone in prison who possibly is innocent is very, very serious to

me. So it goes beyond just being displeased with [Brandi Rachall]. I thought I could evaluate that case properly to prosecute it and obviously I was wrong.

H.R.R. 53-54.

II. ORDER OF THE COURT

Upon considering the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court finds that Applicant Franklin conviction violates the Due Process provisions of the United States and Texas Constitutions, and that he is being unlawfully confined and is constitutionally entitled to a new trial.

Pursuant to Chapter 11 of the Texas Code of Criminal Procedure, the clerk is hereby ordered to prepare a record of all papers in cause number C-2-4267-0569160-A that were filed after September 12, 2001, and transmit it to the Court of Criminal Appeals without delay and no later than November 1, 2001.

It is further ordered that copies of this order be served upon Applicant Franklin, his counsel, and counsel for the State.

Signed the 5th day of November, 2001.

/s/ Wayne Salvant
JUDGE PRESIDING

APPENDIX G

[LOGO]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 74,041

EX PARTE BRIAN EDWARD FRANKLIN, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM TARRANT COUNTY

PER CURIAM. Keller, P.J., *filed a concurring opinion, joined by Hervey and Holcomb, J.J.*. Womack, J., *filed a dissenting opinion, joined by Keasler, J.*.

ORDER

This is an application for a writ of habeas corpus which was transmitted to this Court by the clerk of the trial court pursuant to the provisions of Texas Code of Criminal Procedure Article 11.07.

Applicant was convicted by a jury of aggravated sexual assault of a child under fourteen years of age. TEX. PENAL CODE § 22.021(a)(1)(B)(i), (a)(1)(B)(iii), and (a)(2)(B). His punishment was assessed at life imprisonment. The Second Court of Appeals affirmed. *Franklin v. State*, No. 2-95-084-CR (Tex. App. – Fort Worth Oct. 18, 1996, pet. ref'd) (not designated for publication).

In his present application, applicant contends that newly discovered evidence shows him to be actually innocent of the crime for which he was convicted. Specifically, applicant alleges that the victim lied to prosecutors about her lack of sexual experience at the time of the offense. At applicant's trial, the victim testified that she had never had sex before applicant allegedly sexually assaulted her. She now says she had a sexual relationship with her stepfather for an eleven-year period of time which included the time of the alleged sexual assault by applicant.

Actual innocence claims are governed by the standards set forth in *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). In *Elizondo*, we explained that there are two types of actual innocence claims: *Schlup*-type claims and *Herrera*-type claims. These two classes of claims are derived from two Supreme Court cases. In *Schlup v. Delo*, 513 U.S. 298 (1995), the petitioner raised a claim of actual innocence which was tied to a showing of constitutional error at trial. In *Herrera v. Collins*, 506 U.S. 390 (1993), the petitioner made a claim of actual innocence while conceding that his trial had been error-free. In *Schlup*, the Supreme Court made clear that because a *Herrera*-type claim is made after the defendant has received a fair trial, "it is appropriate to apply an 'extraordinarily high' standard of review" to the petitioner's actual innocence claim. *Elizondo*, 947 S.W.2d at 208 (quoting *Schlup v. Delo*, 506 U.S. at 426). This Court agreed and held that, "in the case of a *Herrera*-type claim of actual innocence, the petitioner must show *by clear and convincing evidence* that no

reasonable juror would have convicted him in light of the new evidence." *Id.* at 209.[1]

Applicant's actual innocence claim does not include a claim that there was any error during his trial. He states in his pleadings that he "has always maintained that he [is] making a claim of 'bare innocence,' otherwise known as a *Herrera*-type claim." Therefore, applicant's actual innocence claim is subject to the "extraordinarily high standard of review" assigned to *Herrera*-type claims.

While the trial court's findings were based upon the correct level of confidence, clear and convincing, the standard to which this level applies was not correctly stated:

> [Applicant] has shown, through clear and convincing evidence, that [the newly discovered evidence], superimposed over the weak inculpatory evidence at his trial, *create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial.*

District Court's Findings of Fact, Conclusions of Law, and Order of the Court, Conclusion of Law 15 (Emphasis added). The proper test is whether applicant has shown "by clear and convincing evidence *that no reasonable juror*

[1] The *Elizondo* standard was created by this Court to replace the *Holmes* standard, which required an actual innocence applicant to show that "based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond reasonable doubt." *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 398 (Tex. Crim. App. 1994). The *Elizondo* standard does not require that the applicant show innocence beyond a reasonable doubt, but rather, that he show, by clear and convincing evidence, that a jury considering his case along with the new evidence, would not have convicted him.

would have convicted him in light of the new evidence." Elizondo, 947 S.W.2d at 209 (emphasis added). We make no judgments as to whether or not applicant in this case has, in fact, met the *Elizondo* standard. We simply direct the trial court to reconsider applicant's claim in light of the proper test.

Since this Court does not hear evidence, *Ex Parte Rodriguez,* 169 Tex.Cr.R. 367, 334 S.W.2d 294 (Tex. Crim. App. 1960), this application for a post-conviction writ of habeas corpus will be held in abeyance pending the trial court's compliance with this order. The trial court shall resolve the issues presented within 60 days of the date of this order. A supplemental transcript containing any affidavits, the transcription of the court reporter's notes from any interrogatories or hearings held, along with the trial court's revised findings of fact and conclusions of law, shall be returned to this Court within 90 days of the date of this order.

IT IS SO ORDERED THIS THE 12th DAY OF SEPTEMBER, 2001.

EN BANC
DO NOT PUBLISH

WOMACK, J., filed a dissenting opinion in which KEASLER, J., joined.

Today the Court again purports to rely on *Herrera v. Collins,* 506 U.S. 390 (1993), as authority for the legitimacy of presenting a claim of newly-discovered evidence through habeas corpus. *Herrera* so clearly stands for the

opposite proposition that one hardly knows whether to laugh or cry at this Court's perversion of it.

> The holdings of that case were: (1) Federal habeas corpus is not available for a claim of newly discovered evidence of innocence in the absence of a violation of constitutionally-required procedures. To require a new trial simply because a jury might acquit in light of the new evidence would not clearly produce a more reliable result, since the passage of time only diminishes the reliability of criminal adjudications. (2) Texas's 30-day limit to move for new trial on newly discovered evidence does not deny due process. (3) Executive clemency is the traditional "fail safe" remedy for late evidence of innocence, (4) Even if it were assumed for the sake of argument that a truly persuasive demonstration of actual innocence would render an execution unconstitutional so that federal habeas corpus would lie, Herrera's evidence fell far short of the extraordinarily high threshold showing that would be required. (Herrera's evidence was two witnesses who said that Herrera's brother, now dead, had admitted committing the crime.)
>
> This is mighty thin sand on which to erect the holding . . . that due process (not the Cruel and Unusual Punishment Clause) would be violated by the execution of an innocent defendant, and that state habeas corpus will lie to permit a defendant to present newly discovered evidence of innocence. And it is no support at all for the holdings in this case that due process is violated by the confinement of an innocent defendant, that post-conviction habeas corpus is available to correct errors of fact, that the defendant must prove his claim by no more than clear and

> convincing evidence, and that the evidence of a recanting witness might be sufficient.
>
> [Because of these holdings] a convicted defendant in every criminal case (if it a due process problem, there is no reason to limit it to felonies or to sentences of confinement), will now be allowed and encouraged to pursue the witnesses and get them to recant. If he does so, he can relitigate his case forever. And all this is supposed to be based on *Herrera*, where the Court said that habeas corpus was not available because, "'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' *Patterson v. New York*, 432 U.S. 197 (1977). To conclude otherwise would all but paralyze our system for enforcement of the criminal law."*

As the Court takes another small step down the path of paralysis, I can only respectfully dissent.

En banc.
Delivered September 12, 2001.
Do Not Publish.

Keller, P.J., *filed a concurring opinon [sic] in which HERVEY, and HOLCOMB, J.J., joined.*

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* *Ex parte Elizondo*, 947 S.W.2d 202, 215 (Tex. Cr. App. 1997) (Womack, J., dissenting to denial of rehearing).

CONCURRING OPINION

One unresolved question in our *Elizondo* jurisprudence is what constitutes the "new evidence" in perjury cases. Is the new evidence confined to what the testimony would have been if the perjury had not occurred? Or is the fact of perjury also "new evidence" that should be considered in determining whether a reasonable juror would convict? The present case illustrates the difference. The complaining witness (a child) lied at trial about her sexual history, denying that she had engaged in sexual activity with anyone except the applicant. Medical evidence, which provided objective evidence of sexual activity, bolstered her testimony. Had the truth been told, the medical evidence would have been largely irrelevant rather than corroborative of the complainant's testimony. To evaluate the new evidence without consideration of the fact of perjury, a habeas court would try to determine what the jury would have done if it had heard the truth the first time around. In other words, the court would look back and evaluate the impact of the different, true testimony on the jury in the original trial, without consideration of the fact that the complainant lied.

If, however, the fact of perjury is also considered to be part of the "new evidence," the complainant's credibility suffers. If the correct standard contemplates an awareness by the jury that the complainant perjured herself, the question becomes what the jury would do with the evidence in light of the complainant's lowered credibility. That is, the court would look forward and evaluate the outcome of a new trial, taking into account the fact that the complainant lied and, possibly, the reasons she gave for lying.

To avoid further remands and give this Court adequate information, I believe that the trial court should evaluate the case under both views of what constitutes "new evidence."

KELLER, Presiding Judge

Date filed: September 12, 2001
Do not publish

APPENDIX H

NO. C-2-4267-0569160-A

EX PARTE	§	IN CRIMINAL DISTRICT COURT
	§	
	§	NUMBER TWO OF
BRIAN EDWARD FRANKLIN	§	TARRANT COUNTY, TEXAS

THE DISTRICT COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE COURT

(Filed Jan. 19, 2000)

Dick DeGuerin and Neal Davis represent Applicant Franklin. Christy Jack, Steven Condor, and Charles Mallin represent the State. On June 8, 1999, Applicant Franklin filed his Application for Post-Conviction Writ of Habeas Corpus Based on Newly Discovered Evidence that Establishes His Actual Innocence. On June 23, 1999, the State filed a brief reply, which conceded that Applicant Franklin had at least met the burden required for an evidentiary hearing on his application for post-conviction writ. During the week of January 3, 2000, this Court conducted an evidentiary hearing that included the presentation of several witnesses and the introduction of numerous exhibits. Upon consideration of all the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court enters the following findings of fact, conclusions of law, and order:

I. FINDINGS OF FACT

1. Applicant Franklin is currently incarcerated and serving a life sentence under the custody and control of

Gary Johnson, who is the Director of the Institutional Division of the Texas Department of Criminal Justice.

2. On June 30, 1994, a grand jury indicted Applicant Franklin in cause number 0546216D for the aggravated sexual assault of thirteen year-old Brandi Rachall on March 5, 1994. **T.C.R. 6.**[1] On December 20, 1994, a grand jury returned an indictment in cause number 0569160R, which was a "direct reindictment" of cause number 0546216D and charged Applicant Franklin with the aggravated sexual assault of Brandi Rachall on March 12, 1994. **T.C.R. 3.**

3. Before Applicant Franklin's trial, the prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb spoke at length on various occasions with Brandi Rachall. **T.C.R. 70; A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.** The Court finds that Brandi Rachall lied when she failed

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[1] There are three different records presently available in Applicant Franklin's case. There is the record from his trial, which will be referred to as "I" and followed by "C.R." for clerk's record or "R.R." for the reporter's record. Roman numerals refer to the volume while arabic numerals refer to the page number of the trial record. There is Applicant Franklin's Application for Post-Conviction Writ of Habeas Based on Newly Discovered Evidence that Establishes His Actual Innocence, which will be referred to as "A. Exhibit" and followed by the exhibit number. Finally, only Rose Anna Salinas' testimony from the habeas corpus heaping, which is the only testimony from that hearing that is presently transcribed, will be referred to as "H.R.R." and followed by the page number of her testimony. Otherwise, references to other witness's testimony or evidence introduced at the habeas corpus hearing will be referred to generally as "*See* H.R.R.," and will be later supplemented with pinpoint cites once the full record of the hearing is transcribed. The record from Applicant Franklin's trial and the exhibits from his Application for Post-Conviction Writ were entered into evidence at the habeas corpus hearing.

to inform them that she had sexual relations with John Guerrro [sic] before Applicant Franklin allegedly sexually assaulted her. ***See*** **A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19;** ***See*** **H.R.R.** Rose Anna Salinas pointed out at the habeas corpus hearing that Brandi Rachall "was not at a very tender age at the time we went to trial. She was not that little. She knew the importance of what we were doing in this courtroom. Absolutely knew it. She's a very smart, intelligent girl." **H.R.R. 23.** Dr. Lamb testified at the habeas corpus hearing that minors are known to make false allegations of sexual assault. ***See*** **H.R.R.**

4. Applicant Franklin pled not guilty and was tried before a jury. **T.C.R. 224.** Michael Logan Ware and Leonard Schilling represented Applicant Franklin at trial. ***Id.*** Rose Anna Salinas and Christy Jack represented the State. ***Id.*** R.E. Thornton was the trial judge. ***Id.***

5. Rose Anna Salinas is a leading legal expert in Texas on sexual assault cases involving complainants who are children. Following her graduation from law school in 1989, she prosecuted criminal cases at the Tarrant County District Attorney's Office until 1998. **A. Exhibit 2; H.R.R. 3.** She was assigned to the Crimes Against Children Unit from 1992 to 1997. **A. Exhibit 2; H.R.R. 4.** She has been a frequent lecturer at seminars dealing with child abuse. **H.R.R. 5-6.** In 1997, she was recognized as a top prosecutor in Texas in child abuse cases. **H.R.R. 7-8.**

6. The Court finds that the State's case against Applicant Franklin was "difficult," in the words of Rose Anna Salinas, because of the little evidence supporting Brandi Rachall's story. ***See*** **T.C.R. 65-68, 86-89, 105-11; A. Exhibit 7; H.R.R. 21-23.**

7. Evidence showed that no eyewitnesses saw the alleged sexual assault. **IX T.R.R. 163;** ***See*** **H.R.R.**

8. No semen, hair, epithelial cells, or other trace evidence of Applicant Franklin was ever discovered or collected. **VIII T.R.R. 53; H.R.R 21;** ***See*** **H.R.R.**

9. Matt Rachall, who is Brandi Rachall's father, and her teacher never observed any physical signs of injury, such as scratches or abrasions, to Brandi Rachall, despite her descriptions of a violent sexual assault and bruising on her face. **T.C.R. 73; VIII T.R.R. 211-12; XIII T.R.R. Exhibit 2.**

10. Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense. **T.C.R. 69-73; VIII T.R.R. 49, 134-37; IX T.R.R. 149; X T.R.R. 56; XIII T.R.R. Exhibits 2, 7.** These inconsistencies ultimately caused the State to obtain a superseding indictment that changed the date of the alleged offense from March 5 to March 12, 1994. ***See*** **T.C.R. 3, 6; H.R.R. 43.**

11. The Court finds that, except for Brandi Rachall's testimony, no evidence at either Applicant Franklin's trial or habeas corpus hearing was introduced to show that Applicant Franklin was in Brandi Rachall's presence at Matt Rachall's house between March 11 and March 20, 1994, even though Brandi Rachall and the State contended that the sexual assault occurred at her father's house sometime during this spring break period. ***See*** **T.C.R. 3, 6;** ***See*** **T.R.R.;** ***See*** **H.R.R. 45-46, 55-56;** ***See*** **H.R.R.**

12. The Court finds that witness testimony and corroborative evidence, namely Applicant Franklin's sales receipts and employee time sheets, established that Applicant Franklin was never present with Brandi Rachall at her father's house between March 11 and March 20, 1994. ***See*** **VIII T.R.R. 149, 189-91; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** For example, during cross-examination at Applicant Franklin's trial, Matt Rachall was asked, "During that spring break week, do you remember whether or not the Defendant visited your home with his children?", to which Matt Rachall responded, "He did not." **VIII T.R.R. 149;** ***See also*** **VIII T.R.R. 189-91.** At the habeas corpus hearing, Matt Rachell testified that, to the best of his recollection, he never saw Applicant Franklin at Matt Rachall's house from March 11 to March 20, 1994. ***See*** **H.R.R.** Matt Rachall's testimony at the trial and habeas corpus hearing was based on calendars that he had made with the assistance of prosecutors Christy Jack and Rose Anna Salinas before Applicant Franklin's trial. ***Id.*****; XIII T.R.R. Exhibit 3.** Applicant Franklin's time sheets from Central Freight Lines showed that he worked every weekday in March 1994, from approximately 6:00 p.m. to midnight. **X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9.**

13. The Court finds that evidence at the trial and habeas corpus hearing revealed that March 6, 1994, was the only date in the entire month of March that Applicant Franklin was in Brandi Rachall's presence at her father's house. **VIII T.R.R. 149; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** The State and several witnesses, including Brandi Rachell, testified that the claimed sexual assault definitely did not occur on March 6, 1994. **VIII T.R.R. 200-01; IX T.R.R. 149;** ***See*** **H.R.R.**

14. The Court finds that, because of the little evidence supporting the claimed sexual assault, the State's case against Applicant Franklin rested in large part on Brandi Rachall's testimony and credibility at trial. As prosecutor Christy Jack stated in her summation at trial, "What it boils down to is: Do you believe Brandi Rachall? When you set everything aside, do you believe Brandi Rachall?" **XI T.R.R. 11-12.** Rose Anna Salinas stated at the habeas corpus hearing that Brandi Rachall's credibility was "very important" and a "primary factor" in the jury's decision to convict Applicant Franklin. **H.R.R. 28-30.**

15. During direct examination at Applicant Franklin's trial, Brandi Rachall reiterated that she had no sexual relations before Applicant Franklin allegedly sexually assaulted her:

Q: Had you ever had sex before?

A: No.

IX T.R.R. 161. The Court finds that Brandi Rachell lied and committed perjury at Applicant Franklin's trial when she testified that she had no sexual relations before Applicant Franklin allegedly sexually assaulted her.

16. The Court finds that the State, to support Brandi Rachall's claim that Applicant Franklin sexually assaulted her, relied on testimony regarding only two pieces of physical evidence: a pair of her bloodstained underwear and a medical examination of her hymen that was conducted several weeks after the alleged offense. **A. Exhibit 2.**

17. Gena Guerrero, who is Brandi Rachall's mother, claimed that she discovered a bloodstain on Brandi

Rachall's underwear on March 21, 1991, a full day after her daughter had returned home from a trip to Waco. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero stated that, after she bleached and washed the underwear, she realized the blood could not have been from menstruation since Brandi Rachall had her period two weeks earlier. **XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero explained that the bloodstain on the underwear was "extremely red" and "really red," in contrast to menstruation stains, which "are a darker red almost brown." ***Id.*** Dr. Lamb testified at trial that bleeding from a sexual assault would be "bright red," not the "brownish" color of menstrual blood. **VIII T.R.R. 61.**

18. Constance Patton, an expert serologist who worked several years for the crime lab of the Forth Worth Police Department, testified at trial and the habeas corpus hearing that a "bright red" bloodstain on the underwear indicated bleeding within the previous few hours. **X T.R.R. 77; *See* H.R.R.** She further stated that a bloodstain older than twenty four hours would appear "brown." ***Id.*** Dr. Lamb testified at the habeas corpus hearing that, in her experience, the "bright red" color of fresh blood quickly turns "brown" due to oxidation. ***See* H.R.R.**

19. The Court finds that witness testimony and corroborative evidence at the trial and habeas corpus hearing established that Gena Guerrero discovered the "extremely red" and "really red" bloodstain on the underwear approximately two weeks after Applicant Franklin had last been in Brandi Rachall's presence at Matt Rachall's house. **VIII T.R.R. 149, 189-91; IX T.R.R. 16-20; X T.R.R. 88; XIII T.R.R. Exhibits 3, 6, 9; A. Exhibits 8, 9; *See* H.R.R.**

20. Because of her "delayed outcry," Brandi Rachall did not undergo a medical examination until several weeks after the alleged sexual assault. **T.C.R. 72-73; XIII T.R.R. Exhibit 2; A. Exhibit 3; H.R.R. 18, 45-46;** ***See*** **H.R.R.** Dr. Lamb, who performed the medical examination, focused on any damage to Brandi Rachall's hymen. **VIII T.R.R. 51-62; A. Exhibit 3;** ***See*** **H.R.R.** An "interruption of the [hymen] tissue at 11:00 and down between 5:00 and 6:00 o'clock" caused Dr. Lamb to testify that Brandi Rachall's hymen had been penetrated. ***Id.*** Operating under the assumption that Brandi Rachall had no sexual relations before the claimed sexual assault, Dr. Lamb wrote in her medical report and testified at trial that the hymen damage was consistent with Brandi Rachall's claim that Applicant Franklin had sexually assaulted her. ***Id.***

21. The Court finds that the trial record and Rose Anna Salinas' testimony at the habeas corpus hearing unquestionably showed that the State's trial preparation, theory, and presentation were all based on Brandi Rachall's repeated assertions that she had no sexual relations before the alleged sexual assault. Rose Anna Salinas specifically testified that Brandi Rachall's supposed virginity before the alleged offense was "one of the most crucial factors" at Applicant Franklin's trial. **H.R.R. 28.** Rose Anna Salinas further stated that, if she had known that Brandi Rachall engaged in sexual relations before Applicant Franklin allegedly committed the offense, "every evaluation . . . made during the trial, during the preparation for the trial would have changed." **H.R.R. 42.**

22. The Court finds that the State introduced evidence to the jury at Applicant Franklin's trial about Brandi Rachall's hymen damage to show or at least

suggest that it was the sole result of Applicant Franklin sexually assaulting her. **VIII T.R.R. 51-62; XII T.R.R. 165-66; A. Exhibits 2, 3; *See* H.R.R.** At the habeas corpus hearing, Rose Anna Salinas testified that she "presented the case to the jury . . . with the theory that changes in the hymen of Brandi Rachall were due to the assault or claimed assault by Brian Franklin" and "that was the theory of the . . . Prosecution all the way through." **H.R.R. 14.**

23. The Court finds that the State introduced evidence to the jury about Brandi Rachall's lack of prior relationship with any males to show or at least suggest that she was a virgin before Applicant Franklin allegedly sexually assaulted her. **IX T.R.R. 135-37; XI T.R.R. 13-15.** Rose Anna Salinas testified that "the questions . . . asked about whether Brandi had had any other boyfriends was another way of asking and obtaining her answer that she had not had sex before . . . I wanted to establish she was very sexually naive and had no other experiences other than this sexual abuse by Brian Franklin." **H.R.R. 17.**

24. The Court finds that the State introduced evidence to the jury about Brandi Rachall's bloodstained underwear to show or at least suggest that it was the sole result of Applicant Franklin allegedly penetrating and breaking her hymen. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibits 2, 8; H.R.R. 50-51; *See* H.R.R.**

25. The Court finds that the State introduced evidence to the jury about Brandi Rachall having nightmares to show or at least suggest that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 28-29, 197; XI T.R.R. 17, 41; *See* H.R.R.**

26. The Court finds that the State introduced evidence to the jury about Brandi Rachall having migraines to show or at least suggest to the jury that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 29-30; *See* H.R.R.**

27. The Court finds that the State introduced evidence to the jury about Brandi Rachall no longer wearing clothes that "[came] above her ankle" to show or at least suggest that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27-28. *See* H.R.R.**

28. The Court finds that the State introduced evidence to the jury about Brandi Rachall going to counseling to show or at least suggest to that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27, 197; H.R.R. 14-16; *See* H.R.R.**

29. On February 24, 1995, the jury found Applicant Franklin guilty and sentenced him to life imprisonment. **T.C.R. 224; XI T.R.R. 46; XII T.R.R. 177.**

30. Applicant Franklin directly appealed his conviction, which the Second Court of Appeals affirmed in an unpublished opinion on October 17, 1996, in cause number 02-95-00084-CR. Applicant Franklin filed a Petition for Discretionary Review, which the Court of Criminal Appeals denied on February 26, 1997.

31. On May 15, 1998, prosecutor Christy Jack sent defendant's trial counsel Leonard Schilling a letter stating, "Please find enclosed information that was brought to our attention on May 13, 1998, which may or may not concern the Brian Franklin case." **A. Exhibits 5,10, 11.**

32. Sent with prosecutor Christy Jack's letter were various affidavits, police investigation notes, and other information relating to new claims that Brandi Rachall had recently made about having sexual relations with John Guerrero, who was her stepfather at the time. ***See Id.***

33. In an affidavit dated May 5, 1998, Brandi Rachall stated that she had daily sexual relations with her stepfather for over eleven years. **A. Exhibit 6.**

34. This eleven-year period of daily sexual relations covered the time before, during, and after the alleged sexual assault that Brandi Rachall claimed Applicant Franklin committed on her. ***Id.***

35. The Court finds that Brandi Rachall's May 1998 affidavit to police directly contradicted her own testimony, as well as the testimony of other witnesses, adduced before and during Applicant Franklin's trial. ***Id.***; ***See*** **T.C.R.**; ***See*** **T.R.R.**; **A. Exhibits 2, 3, 10, 11;** ***See*** **H.R.R.**

36. The Court finds that the diligent pre-trial and trial investigations of Applicant Franklin's counsel did not and could not have uncovered this new evidence regarding Brandi Rachall's sexual relations with John Guerrero. ***See*** **A. Exhibits 10, 11.**

37. The Court finds that whether a complainant in a sexual assault case has a single perpetrator or multiple perpetrators will determine what evidence the State will introduce at trial. Rose Anna Salinas testified at the habeas corpus hearing that it is "important to know the sexual history, if there is one, of a child who is the complaining witness in a case of sexual assault . . . One of the reasons you need to know that is because like this particular case

. . . you may not be able to bring that medical evidence to a jury . . . Another reason is if you have psychological type of trauma that is evidence . . . you may be limited." **H.R.R. 9-10.**

38. The Court finds that, in light of the new evidence, testimony about the damage to Brandi Rachall's hymen would not have been introduced at Applicant Franklin's trial, Rose Anna Salinas testified, "I certainly would have never been able to offer the medical evidence that I offered against Brian Franklin. I would have never been able to offer that against him. I wouldn't have presented it, I couldn't. I could not say that the injury was caused by him . . . I can tell you right now that that medical evidence would not have been offered against him." **H.R.R 24-25, 27; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

39. The Court finds that, in light of new evidence, testimony about Brandi Rachall's bloodstained panties would not have been introduced at the trial. Rose Anna Salinas testified that it was "very likely that the testimony [about the bloodstained underwear] . . . would not have been admissible." **H.R.R. 51; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

40. The Court finds that, in light of the new evidence, Brandi Rachall almost surely would have never testified at trial. Rose Anna Salinas testified, "To me [Brandi Rachall] was very credible . . . [I] believed her . . . Otherwise, I would have never gone into court with this case," "I just know that I no longer find her credible," and "her credibility as presented to this jury [at Applicant Franklin's trial] was deeply and adversely affected." **H.R.R. 23, 49, 61.**

41. The Court finds that, in light of the new evidence, the State would have dismissed the case against Applicant Franklin or at the very least requested a mistrial at Applicant Franklin's trial. Rose Anna Salinas stated in her affidavit, "Had I known that . . . Brandi Rachall intentionally withheld evidence of her previous sexual contact with John Guerrero, I would have had such serious doubts about Applicant Franklin's guilt that I would have immediately dismissed the charges against him." **A. Exhibit 2.** At the habeas corpus hearing, Rose Anna Salinas testified, "I thought I could evaluate [Applicant Franklin's] case properly to prosecute it and obviously I was wrong. [Brandi Rachall] fooled me" and that "I might have moved to dismiss this case. And that's a very strong possibility that would have happened . . . [At] the very least [I] would have joined the defense in a motion for mistrial." **H.R.R. 54, 63.**

42. The Court finds that, in light of the new evidence, the jury's verdict at Applicant Franklin's trial would have been adversely affected and probably different on retrial. Rose Anna Salinas testified at several points during the habeas corpus hearing that Brandi Rachall's lies concerning her sexual history "permeated the case" and "adversely affected . . . the integrity of the jury's verdict." **H.R.R. 30, 48.** At the end of her testimony, Rose Anna Salinas stated, "My opinion is that I don't believe [Applicant Franklin] got a fair trial" and "the bottom line is this jury verdict cannot be trusted because of the false information." **H.R.R. 62, 67.**

II. CONCLUSIONS OF LAW

1. The purpose of a writ of habeas corpus, known as the "Great Writ" because it dates back at least to 1679 England, is to allow an incarcerated individual to challenge the lawfulness of his confinement.

2. The Due Process Clauses of the United States and Texas Constitutions, along with Article 11 of the Texas Code of Criminal Procedure, give an incarcerated individual the right to file an application for writ of habeas in certain situations where that individual's fundamental constitutional rights have been violated.

3. "The central purpose of any system of criminal justice is to convict the guilty and free the innocent." ***Herrera v. Collins***, 506 U.S. 390, 398 (1993). Over the last few years, the Court of Criminal Appeals has frequently cited this language in shaping the doctrine of post-conviction habeas corpus based on new evidence that establishes an individual's actual innocence. ***See, e.g., State ex rel. Holmes v. Court of Appeals***, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994); ***Ex parte Elizondo***, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). "The incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a post-conviction habeas corpus proceeding whether the punishment assessed is death or confinement." ***Ex parte Elizondo***, 947 S.W.2d at 205.

4. ***Ex parte Elizondo*** held that the ***Holmes*** test was too strict for establishing actual innocence in an application for post-conviction writ.

> At the outset, we perceive an anomaly in our ***Holmes*** opinion, which describes the ultimate criterion for relief under actual innocence test as if our task were to decide whether the evidence of guilt could support a conviction in light of the newly discovered evidence. Such characterization is misleading because, if habeas corpus relief is to be conditioned upon a finding that no rational juror could convict the applicant after introduction of the newly discovered evidence, it becomes theoretically impossible for any habeas applicant to sustain this burden because exculpatory evidence can never outweigh inculpatory evidence under this standard of [legal] sufficiency.

Ex parte Elizondo, 947 S.W.2d at 205.

5. ***Elizondo*** altered the ***Holmes*** test and replaced it with a more lenient and realistic standard. "It is not reasonable to hold, and we reject the implication of ***Holmes***, that confidence in a verdict is undermined only when the newly discovered evidence renders the State's case legally or constitutionally insufficient for a conviction." ***Id.*** at 206.

6. Under ***Elizondo***, the court must "assess the probable impact of the newly discovered evidence upon the persuasiveness of the State's case as a whole . . . . [and] must necessarily weigh such exculpatory evidence against the evidence of guilt adduced at trial." ***Id.*** at 206. The applicant is entitled to relief if he can show, by "clear and convincing evidence," that the "newly discovered evidence, if true, creates a doubt as to the efficacy in the verdict and that it is probable that the verdict would be different [on retrial]." ***Id.*** "The court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence . . . Obviously,

the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence must be." *Id.* at 207.

7. The Court concludes that Applicant Franklin has demonstrated, through clear and convincing evidence, there was no strong inculpatory evidence at his trial. Indeed, Rose Anna Salinas testified at the habeas corpus hearing that the State's case against Applicant Franklin was "difficult" at trial.

8. No eyewitnesses saw the alleged sexual assault. No trace evidence was discovered or collected. Matt Rachall and Brandi Rachall's teacher never observed any physical signs of injury to Brandi Rachall, despite her claims of a violent sexual assault and bruising on her face.

9. Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense, which forced the state to obtain a superseding indictment that changed the date of the alleged offense.

10. The State and Brandi Rachall contended that the alleged offense definitely occurred sometime between March 11 and March 20, 1994.

11. The Court concludes that the credible witness testimony and corroborative evidence, namely Applicant Franklin's sales receipts and employee time sheets, show that he was never present with Brandi Rachall between March 11 and March 20, 1994.

12. The Court concludes that, because of the little evidence supporting the alleged sexual assault, the State's case rested in large part on Brandi Rachall's testimony and credibility, along with two pieces of physical evidence:

a pair of bloodstained underwear and a medical examination of her hymen.

13. The Court concludes that, as Rose Anna Salinas' affidavit and her testimony at the habeas corpus hearing show, the relevance of the bloodstained underwear and hymen damage depended on Brandi Rachall's repeated lies before and during trial when she failed to reveal she had sexual relations prior to Applicant Franklin allegedly sexually assaulted her.

14. The Court concludes that, as Rose Anna Salinas testified, the State's trial preparation, theory, and presentation were all based on Brandi Rachall's repeated representations before and during trial about her sexual history.

15. The Court concludes that Applicant Franklin has shown, through clear and convincing evidence, that Brandi Rachall's lies and perjury regarding her sexual history, superimposed over the weak inculpatory evidence at his trial, create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial.

16. The Court concludes that Brandi Rachall repeatedly lied about her sexual history to prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb, before Applicant Franklin's trial.

17. The Court concludes that Brandi Rachall committed perjury when she testified about her sexual history at Applicant Franklin's trial.

18. The Court concludes that the new evidence casts doubt on Brandi Rachall's credibility as a witness.

19. The Court concludes that the new evidence casts doubt on whether Brandi Rachall's hymen damage or bloodstained underwear was the sole result of Applicant Franklin allegedly sexually assaulting her.

20. The Court concludes that the new evidence casts doubt on whether Brandi Rachall's nightmares, migraines, counseling, or change in dress were the sole result of Applicant Franklin allegedly sexually assaulted her.

21. The Court concludes that the new evidence, as Rose Anna Salinas repeatedly stated at the habeas corpus hearing, undermined the integrity of jury's verdict at Applicant Franklin's trial and would have probably resulted in a different verdict on retrial.

22. The Court concludes that the new evidence, as Rose Anna Salinas testified, prevented Applicant Franklin from receiving a fair trial under the United States and Texas Constitutions.

23. The Court concludes that the new evidence, as Rose Anna Salinas emphasized, would have changed the State's evaluation of the case. The State would have dismissed the case or at the very least joined the defense in a motion for mistrial.

24. The Court concludes that Applicant Franklin has methodically shown, through clear and convincing evidence, that his conviction based upon the lies and perjury of Brandi Rachall violated the Due Process Clauses of the United States and Texas Constitutions.

25. The Court concludes that, in light of the new evidence, Applicant Franklin is being unlawfully confined and is constitutionally entitled to a new trial under

Elizondo. As Rose Anna Salinas eloquently stated at the end of the habeas corpus hearing, the new evidence:

> goes to something much more serious for me. And I think anybody who knows me knows that I take it very seriously when I ask a jury to send someone to prison for life. I have to be sure about my case. I always prosecuted cases that way. And to find out years later that this information has now come forward and that there is someone in prison who possibly is innocent is very, very serious to me. So it goes beyond just being displeased with [Brandi Rachall]. I thought I could evaluate that case properly to prosecute it and obviously I was wrong. She fooled me. * * * My opinion is that I don't believe [Applicant Franklin] got a fair trial * * * The bottom line is this jury verdict cannot be trusted because of the false information.

H.R.R. 53-54, 62, 67.

III. ORDER OF THE COURT

Upon consideration of the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court finds that Applicant Franklin's conviction based upon the lies and perjury of Brandi Rachall at his trial violated the Due Process Clauses of the United States and Texas Constitutions, and that he is being unlawfully confined and is constitutionally entitled to a new trial.

Pursuant to Article 11 of the Texas Code of Criminal Procedure, the clerk is hereby ordered to prepare a record of all papers in cause number C-2-4267-0569160-A and

transmit it to the Court of Criminal Appeals without delay. The record shall include, but is not limited to, pleadings, exhibits and affidavits filed in the habeas corpus proceeding, the original record of Applicant Franklin's original trial, as well as a copy of these findings of fact, conclusions of law, and order of the Court.

It is further ordered that copies of this order be served upon Applicant Franklin, his counsel, and counsel for the State.

Signed this 3rd day of February 2000.

/s/ Wayne Salvant
JUDGE PRESIDING

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10641

BRIAN EDWARD FRANKLIN

Petitioner-Appellant

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

(Filed Mar. 16, 2005)

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM*:

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH

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* For the reasons previously stated in his panel dissent, Judge Garza dissents from the court's denial of Franklin's petition for en banc rehearing.

CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith Brown Clement
United States Circuit Judge

APPENDIX J

U.S. Const. Amend. V

→ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

→ AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence

that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the

United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
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> **(B)** the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this

section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.